Supreme Court, U.S.
FILED
07-397 SEP 25 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

TROY KING,
Attorney General for the State of Alabama,
in his official capacity, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUHANA S. HAN
Counsel of Record
SARA L. MANAUGH
JORDAN T. RAZZA
SULTANA L. BENNETT
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner
Thomas D. Arthur

September 25, 2007

CAPITAL CASE
EXECUTION DATE: SEPTEMBER 27, 2007

QUESTIONS PRESENTED

1. Whether the "strong equitable presumption" against the entry of a stay is applicable to a § 1983 complaint brought by a death-sentenced inmate seeking DNA testing, where (i) the complaint was filed before the conclusion of federal habeas review and before the state moved to set an execution date; (ii) the inmate has been deprived of the tools necessary to demonstrate innocence, including the opportunity to litigate the merits of his claims before *any* state or federal post-conviction court; (iii) the relevant Supreme Court precedent involved lawsuits filed only days before scheduled executions; (iv) the uncertainty regarding the applicability and scope of such precedent in the context of lethal injection cases has resulted in the application of disparate measures of timeliness for § 1983 actions by the Courts of Appeal; and (v) DNA testing cases implicate the uniquely grave concern that the state may execute an innocent person.

2. If the "strong equitable presumption" against the entry of a stay is applicable, whether the Eleventh Circuit correctly applied this standard in affirming the dismissal of Mr. Arthur's complaint, where the court (i) created an irrebuttable presumption that would have barred any review on the merits of Mr. Arthur's DNA claims even if he had been entitled to such review; (ii) failed to recognize the potentially exculpatory force of DNA testing, which could confirm the previous testimony of the prosecution's star witness that a burglar—not Mr.

Arthur—had committed the murder and could identify the real perpetrator; and (iii) based its finding of "unreasonable delay" on certain factors beyond Mr. Arthur's control, including the amount of time it took for the courts to adjudicate his habeas petition before dismissing it as untimely, and the unavailability of advanced DNA technology during his trial.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Mr. Arthur's Trial and Conviction 2

B. Federal Post-Conviction Proceedings and Mr. Arthur's Efforts to Obtain Access to Physical Evidence for DNA Testing 7

C. Proceedings Below 9

D. Jurisdiction Below 12

REASONS FOR GRANTING THE PETITION 12

I. The Court Should Grant Certiorari to Clarify Under What Circumstances a "Strong Equitable Presumption" Is Applicable to a Death-Sentenced Inmate's Section 1983 Action. 14

TABLE OF CONTENTS
(continued)

Page

II. The Court Should Grant Certiorari to Clarify That Application of a "Strong Equitable Presumption" to a Death-Sentenced Inmate's Section 1983 Action Requires a Careful Inquiry into the Facts and Equities of the Case.....20

A. Mr. Arthur Has Demonstrated a Likelihood of Success on the Merits. 22

B. Mr. Arthur Did Not Unreasonably Delay in Bringing His § 1983 Complaint. 28

C. The Court Failed to Consider the Critical Issue of the Public Interest. 30

CONCLUSION 32

Memorandum Opinion and Order of the District Court for the Middle District of Alabama, dated August 17, 2007 .....A1

Opinion and Order of the District Court for the Middle District of Alabama, dated August 30, 2007 .....A35

Opinion of the Court of Appeals for the Eleventh Circuit, dated September 21, 2007 .....A42

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Beardslee v. *Woodford*,
395 F.3d 1064 (9th Cir. 2005) 19

Bell Atlantic Corp. v. *Twombly*,
127 S. Ct. 1955 (2007) 10-11

Brady v. *Maryland*,
373 U.S. 83 (1963) 10

Cooey v. *Strickland*,
479 F.3d 412 (6th Cir. 2007) 19

Ford v. *Wainwright*,
477 U.S. 399 (1986)..... 20

Gomez v. *United States Dist. Court for the N. Dist. of Cal.*,
503 U.S. 653 (1992)..... 15

Grayson v. *Allen*,
491 F.3d 1318, 1325 (11th Cir. 2007)..... 18

Harvey v. *Horan*,
285 F.3d 298 (4th Cir. 2002) 12

Hill v. *McDonough*,
126 S. Ct. 2096 (2006) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Winship,
397 U.S. 358 (1970)..... 31

Mathews v. *Eldridge*,
424 U.S. 319 (1976)..... 10

Nelson v. *Campbell*,
541 U.S. 637 (2004)..... *passim*

Nooner v. *Norris*,
491 F.3d 804 (8th Cir. 2007) 18

Reese v. *Livingston*,
453 F.3d 289, 291 (5th Cir. 2006) 18

Schlup v. *Delo*,
513 U.S. 298 (1995)..... 30-31

Solesbee v. *Balkcom*,
339 U.S. 9 (1950) 20

Yarris v. *County of Delaware*,
465 F.3d 129 (3d Cir. 2006)..... 28

STATE CASES

Commonwealth v. *Rosier*,
685 N.E.2d 739 (1997) 23

Wicker v. *Alabama*,
433 So. 2d 1190 (Ala. Crim. App. 1983)..... 3-4

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES AND RULES

U.S. Const. amend. XIV, § 1 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 12

28 U.S.C. § 1331 12

28 U.S.C. § 1343 12

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 12 10-11

STATE STATUTES

Ala. Code § 36-18-20 (2007) 24

Ala. Code § 36-18-22 (2007) 24

Ala. Code § 36-18-24 (2007) 24

OTHER AUTHORITY

13 James Wm. Moore *et al.*,
Moore's Federal Practice
§ 65.22 (3d ed. 2007) 21-22

PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas D. Arthur, an indigent inmate sentenced to be executed on September 27, 2007, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit dated September 21, 2007, affirming the judgments of the United States District Court for the Middle District of Alabama, dated August 17, 2007, and August 30, 2007.[1] Mr. Arthur also respectfully requests that the Court stay Mr. Arthur's execution so that he is not put to death before the claims set forth herein receive full consideration.

OPINIONS BELOW

The August 17, 2007 Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama dismissing Mr. Arthur's Complaint brought pursuant to 42 U.S.C. § 1983 ("Complaint") appears in the Appendix to this Petition at A1. The August 30, 2007 Opinion and Order denying Mr. Arthur's motion to amend or alter the dismissal order appears in the Appendix to this Petition at A35.

The September 21, 2007 decision of the Eleventh Circuit affirming the District Court's

---

[1] Mr. Arthur is not proceeding *in forma pauperis* because pro bono counsel have volunteered to pay the filing fee on his behalf.

dismissal appears in the Appendix to this Petition at A42.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on September 21, 2007. This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of [State law], subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Mr. Arthur's Trial and Conviction

On the morning of February 1, 1982, the police responded to a call at the Wicker residence in Muscle Shoals, Alabama, where they found Judy Wicker

lying on the floor with blood on her face and her sister Teresa Rowland kneeling beside her. (T.R. 310-11, 322, 337-42)[2] The police found Troy Wicker's body in the bedroom with a gunshot wound to the right eye. (T.R. 318-20)

The police collected physical evidence from the crime scene, including Judy Wicker's blood-stained clothing and torn undergarment (T.R. 365–66), vacuum sweepings, hairs (T.R. 368), shell casings (T.R. 363–64), and a pillowcase with gunpowder flakes (T.R. 367). The police also dusted the area for latent fingerprints. (T.R. 368) The police located Judy Wicker's 1981 Buick Riviera, which had been abandoned in a parking lot; the police searched it and found a wig, hairs, and latent fingerprints. (T.R. 370–71) The murder weapon was never recovered. (T.R. 352) The hairs and fingerprints found at the crime scene and in the Buick Riviera were tested but they did not match Mr. Arthur's.

After the shooting, Judy Wicker was taken to the hospital and remained there for several days. (T.R. 776) She suffered "a bruise around her left eye, a laceration of her left upper lip, two chipped teeth

---

[2] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third trial.

and an abrasion on her left hip." *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192–93 (Ala. Crim. App. 1983). Moreover, on the same day as the murder, a rape kit was prepared and seminal fluid collected. (Exs. 2 and 3 to Complaint)

In response to questioning by investigators at the hospital, Judy Wicker provided the following account of the crime: She returned home after dropping her children off at school. *Wicker*, 433 So. 2d at 1194. When she entered her house, she found an African-American man burglarizing her home. *Id.* at 1192, 1194. The burglar raped her, knocked her unconscious, and then shot Troy Wicker. Consistent with this account, Officer Lanny Coan corroborated that shortly after he arrived at the crime scene, Judy Wicker told him that she had been raped by an African-American man. *Id.* at 1192.

Judy Wicker was eventually charged with her husband's murder under the theory that she killed him to collect approximately $90,000 in life insurance proceeds. (T.R. 831) At her trial in 1982, she testified under penalty of perjury to the same version of events that she had related to the investigators. *Wicker*, 433 So. 2d at 1192–94. Despite her claims of innocence, Judy Wicker was convicted of murdering her husband and was sentenced to life imprisonment. (T.R. 794–95)

At Mr. Arthur's trial in 1991, Judy Wicker gave a completely different account of the murder. (T.R. 787) Although she previously had sworn under

oath that a burglar had murdered her husband, she now claimed that she, along with Teresa Rowland and her sister's boyfriend, Theron McKinney, had decided to kill Troy Wicker, and that she had paid Mr. Arthur to pull the trigger. (T.R. 776, 781, 800) She also paid Rowland $6,000 and gave McKinney jewelry and a Trans Am in exchange for their assistance in carrying out the murder. (T.R. 780) The State of Alabama, however, never prosecuted Rowland or McKinney.

At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. In return for her testimony, the state prosecutor, Gary Alverson, promised to make a parole recommendation on her behalf. (T.R. 823–26, 830–31) Prior to becoming a state prosecutor, Alverson had represented Judy Wicker and assisted her in procuring a deal from the then-prosecutor in exchange for her testimony. (T.R. 825–27) Thus, the State's prosecutor offered his former client a deal: assist in the prosecution of Mr. Arthur and obtain early parole. Judy Wicker was released after serving only about ten years of her life sentence.

The circumstantial evidence introduced at Mr. Arthur's trial to support Judy Wicker's story was weak. Officer Lang testified that he observed Judy Wicker driving past a school crossing twice prior to 8 a.m. (T.R. 306, 308–09) This testimony just as credibly supported her initial story that an unknown intruder assaulted her in her home and killed her

husband. Pat Halliday testified regarding Mr. Arthur's possession of a large amount of money after the murder, but this testimony was also consistent with evidence that Mr. Arthur had won money in a poker game. (T.R. 543, 882–83) Debra Philips testified merely that Mr. Arthur threw a garbage bag into the Tennessee River. (T.R. 632–34)

Patricia Yarbrough Green, a convicted felon, testified that Mr. Arthur stopped by Cher's Lounge between 2 p.m. and 4:30 p.m. on the day before the murder, and asked her to purchase .22 mini mag long rifle bullets. (T.R. 562) Green further testified that she asked Terry Lewis to purchase these bullets from Woolco and he did so between 3 p.m. and 4 p.m., and that she gave these bullets to Mr. Arthur while he was still at Cher's Lounge. (T.R. 562, 575) According to Green, Mr. Arthur told her that the bullets would be used to kill someone in Tennessee. (T.R. 566) Troy Wicker, however, was killed in Alabama. Moreover, Lewis testified at Mr. Arthur's first and second trials that he gave the bullets to Green around 6 p.m. or 6:15 p.m.[3]—not between 3 p.m. and 4 p.m. as Green had testified. Indeed, Lewis' testimony demonstrates that there was no way that Green could have given Mr. Arthur the bullets before he left Cher's Lounge around 4:30 p.m.

---

[3] (Trial transcript from 1983 trial at 1240; trial transcript from 1987 trial at 574-75) Terry Lewis did not testify at Mr. Arthur's third trial.

During Mr. Arthur's three-day trial, he was permitted to represent himself. As he explained to the trial court, Mr. Arthur's decision was the result of his intense frustration with his counsel's failure to communicate with him and to prepare adequately for trial. The court, however, did not hold a hearing or engage in a colloquy to determine whether Mr. Arthur's decision was knowing and voluntary prior to granting his request to represent himself.

On December 5, 1991, Mr. Arthur was convicted of capital murder for the 1982 killing of Troy Wicker. On the same day, the penalty phase that followed lasted less than an hour and a half. Mr. Arthur's counsel conducted no independent investigation and offered no mitigation testimony. The jury recommended the death penalty by a vote of 11–1.

B. Federal Post-Conviction Proceedings and Mr. Arthur's Efforts to Obtain Access to Physical Evidence for DNA Testing

Mr. Arthur's conviction and sentence were affirmed on direct appeal in 1998. Notwithstanding his diligent efforts, Mr. Arthur was unable to find counsel or other means of access to the courts for either state or federal collateral proceedings before both statutes of limitations had run. In order to overcome this procedural bar, Mr. Arthur—with the assistance of pro bono counsel he finally succeeded in locating—diligently tried to develop facts relating to

his gateway claim of actual innocence and his tolling claims.

As set forth in his Complaint, Mr. Arthur has diligently tried to obtain access to critical pieces of physical evidence for purposes of DNA testing. Mr. Arthur filed a motion for access to trial exhibits in the Circuit Court of Jefferson County, Alabama, but the state court declined to rule on the motion and instead transferred the exhibits to the federal district court, which denied Mr. Arthur's motion on April 30, 2002.

On June 3, 2002, in connection with federal habeas proceedings, Mr. Arthur requested discovery relating to actual innocence, and sought to conduct DNA testing for the first time on physical evidence, including a rape kit and blood-stained clothing.[4] The district court denied Mr. Arthur's request for DNA testing, rejected his tolling claims, and dismissed his first and only habeas petition as time-barred on December 4, 2002. On December 17, 2002, Mr. Arthur filed a motion to alter or amend the judgment

---

[4] Mr. Arthur also sent letters to Defendants or their predecessors in office, as well as to other potential custodians of evidence, in an effort to locate the evidence and request that it be preserved. The letters asked the recipient to search available records to confirm whether the recipient is in possession of the evidence, and if so, to preserve the evidence. (Exs. 6–27 to Complaint)

in the district court, which was denied on June 4, 2003.

On October 6, 2003, Mr. Arthur filed his appellant's brief in the Eleventh Circuit Court of Appeals, challenging the dismissal of his habeas petition and the denial of his motion for leave to conduct discovery. The State of Alabama filed its brief on December 23, 2003, followed by Mr. Arthur's filing of his reply brief on January 23, 2004. On June 21, 2006, the Eleventh Circuit affirmed the district court's opinion in its entirety. On July 11, 2006, Mr. Arthur filed a petition for rehearing and rehearing en banc, which was denied on August 14, 2006.

On January 11, 2007, Mr. Arthur filed a petition for certiorari with the United States Supreme Court, which was denied on April 16, 2007. Accordingly, Mr. Arthur stands to be executed without ever having received *any* post-conviction review—state or federal—on the merits of his claims.

C. Proceedings Below

Before the conclusion of federal habeas review and before the State of Alabama moved to set an execution date, on April 12, 2007, Mr. Arthur filed this action pursuant to 42 U.S.C. § 1983 seeking to conduct DNA testing on critical pieces of physical evidence, including a rape kit, blood-stained clothing, and hairs. Mr. Arthur proposed to pay for such testing so that the State would incur no expense.

On April 17, 2007, the State of Alabama moved to set an execution date for Mr. Arthur. The Alabama Supreme Court granted the State's motion on June 22, 2007, and set an execution date of September 27, 2007.

On May 7, 2007, one of the defendants moved for a 14-day extension of time in which to file a motion to dismiss, which the District Court granted. On May 18, 2007, all defendants moved to dismiss the Complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure on various grounds, arguing, among other things, that there is no constitutional right to DNA testing under the Fourteenth Amendment's guarantee of due process as construed in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). On June 18, 2007, Mr. Arthur filed a Memorandum in Opposition to the State's motion, and the State's reply brief was filed on July 2, 2007.

In an order dated August 17, 2007, the District Court granted the State's motion to dismiss. (A1) The District Court did not address whether Mr. Arthur had adequately pled that the DNA testing he sought would bear out his longstanding claims of innocence and allow him finally to present his meritorious constitutional claims to a court. Rather than applying the standard of review appropriate on a Rule 12 motion—whereby the court declines to dismiss as long as the allegations "raise a right to relief above the speculative level . . . on the

assumption that all of the allegations in the complaint are true," *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citation omitted)—the District Court applied the "strong equitable presumption" against granting relief that a court would apply in evaluating a request for a stay of execution, and determined that it should not entertain Mr. Arthur's claims. (A34) The District Court applied this standard on the purported grounds that Mr. Arthur's request for access to evidence for DNA testing could not be litigated without entry of a stay of execution, and that this Court has recognized federal courts' "equitable powers to dismiss § 1983 suits they saw as speculative or filed too late in the day." (A12 (internal punctuation and citation omitted))

On August 27, 2007, Mr. Arthur timely moved the District Court to alter or amend its judgment of dismissal, which the District Court denied on August 30, 2007. (A35)

On September 12, 2007, Mr. Arthur appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit on various grounds, including that (1) the district court erred in applying a "strong equitable presumption" against granting relief; (2) the District Court erred in concluding that Mr. Arthur had not demonstrated a likelihood of success on the merits; and (3) the District Court erred in concluding that Mr. Arthur unreasonably

delayed in asserting his claims. Mr. Arthur also moved the Eleventh Circuit for a stay of execution.

On September 21, 2007, the Eleventh Circuit affirmed in their entirety the District Court's August 17 and August 30 decisions. (A58) The Eleventh Circuit agreed with the District Court that Mr. Arthur's Complaint could not be litigated without entry of a stay, and that dismissal was appropriate because Mr. Arthur failed to rebut the "strong equitable presumption against the grant of the stay." (A55) Like the District Court, the Eleventh Circuit did not reach the merits of Mr. Arthur's Complaint.

D. Jurisdiction Below

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Eleventh Circuit was proper under 28 U.S.C. § 1291 because Mr. Arthur appealed from the District Court's final judgment and denial of injunctive relief.

REASONS FOR GRANTING THE PETITION

As many jurists have come to recognize, the contours of the right to DNA testing as a means of demonstrating actual innocence is "one of the most important criminal law issues of our day." *Harvey* v. *Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc).

Nonetheless, many courts continue to approach claims for DNA testing with skepticism. Such skepticism is rarely directed any longer at the soundness of the science involved, or its ability to match physical evidence to a specific individual (or to rule out such matches) with an extraordinary degree of accuracy. Indeed, the reliability and legitimacy of the technology used for testing has been amply demonstrated; DNA testing is now used by all fifty states and the federal government as a key law enforcement tool. Rather, courts have looked askance at such claims when they are brought by death-sentenced inmates seeking to demonstrate their innocence—particularly when they are brought at the eleventh hour, with an execution date looming—on the assumption that the claims are a tactic used to delay an execution.

Some courts have responded to such cases by adopting a standard applying a "strong equitable presumption" that would bar the claim if it is brought too late to litigate fully without the entry of a stay of execution. Whatever wisdom there may be to such a standard, there are significant problems with its application, both generally and in Mr. Arthur's case. *First*, courts have applied this Court's teaching as to the contours and applicability of this presumption in widely divergent and contradictory ways. *Second*, courts applying the "strong equitable presumption" have frequently failed to inquire into the unique circumstances and

equities of the case in order to determine whether the presumption is rebutted. This is what happened in Mr. Arthur's case. *Third*, to the extent that a death-sentenced inmate seeking DNA testing must show a likelihood of success on the merits of his claim, there is a lack of clarity as to the required showing. The guidance of this Court is necessary on these critical questions that bear on matters of life and death.

I. The Court Should Grant Certiorari to Clarify Under What Circumstances a "Strong Equitable Presumption" Is Applicable to a Death-Sentenced Inmate's Section 1983 Action.

In *Hill* v. *McDonough*, 126 S. Ct. 2096, 2102 (2006), this Court held that death-sentenced inmates could use 42 U.S.C. § 1983 as a vehicle to challenge the method by which the State proposed to execute them. In so holding, it answered a question left open in its decision in *Nelson* v. *Campbell*, 541 U.S. 637 (2004). In *Nelson*, the Court recognized the availability of § 1983 to inmates seeking to challenge certain execution procedures on Eighth Amendment grounds. In *Hill*, the Court reaffirmed an important limitation on § 1983 litigation by death-sentenced inmates first set forth in *Nelson*: "a strong equitable presumption against the grant of a stay" of execution exists "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," *Hill*, 126 S. Ct. at

2104; *Nelson*, 541 U.S. at 650, and courts could use that presumption to dismiss cases that were filed at the "last minute." *Hill*, 126 S. Ct. at 2104 (citing *Gomez* v. *United States Dist. Court for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)); *Nelson*, 541 U.S. at 649 (quoting *Gomez*, 503 U.S. at 654). Hill and Nelson filed their complaints, respectively, four days and three days before their scheduled executions. Thus, *Hill* and *Nelson* identified the "State's strong interest in proceeding with its judgment" and potential manipulative or dilatory motives on the part of the plaintiff as reasons to dismiss such cases. *Hill*, 126 S. Ct. at 2104; *Nelson*, 541 U.S. at 649-50. *Hill* and *Nelson*, however, did not address the critical question presented here: whether the "strong equitable presumption" applies to a § 1983 action seeking DNA testing that was filed *before* an execution became imminent.

In affirming the dismissal of Mr. Arthur's Complaint, the Eleventh Circuit cited the "strong equitable presumption" of *Hill* and *Nelson*. (A50) The district court found "no logical or precedential reason to treat a § 1983 request for injunctive relief for purposes of DNA or other testing any differently than a § 1983 challenge to the method of execution" (A12 n.5), and the Eleventh Circuit agreed. In so doing, the courts below have become the first to apply the "strong equitable presumption" in a DNA access case. DNA access cases, however, implicate concerns that are not present in method-of-execution

cases, paramount among which is the real possibility that the relief sought could prevent the state from executing an innocent person.[5] Under the circumstances of Mr. Arthur's case, the Eleventh Circuit erred in applying *Hill* and *Nelson* to bar Mr. Arthur from litigating the merits of his DNA claims.

Instead of inquiring into the merits of Mr. Arthur's Complaint, the appellate court merely concluded that Mr. Arthur had failed to overcome the "strong equitable presumption" against the entry of a stay. (A52–A55) It did so although (1) Mr. Arthur brought his § 1983 action before the conclusion of federal habeas review and before the State had even moved for an execution date to be set; and (2) Mr. Arthur had not sought a stay, and at the time he filed his Complaint, Mr. Arthur had no basis to believe that a stay would be necessary to litigate his claim. The Eleventh Circuit misinterpreted and improperly extended this Court's precedent into contexts that this Court did not contemplate.

Both *Hill* and *Nelson* involved § 1983 actions that had been commenced within days of a scheduled execution. Mr. Arthur, by contrast, filed his Complaint when no execution date had been set. The execution date that was later set fell more than

---

[5] Fifteen people exonerated through the results of DNA testing spent time on death row. *See* The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (last visited Sept. 24, 2007).

five months after the date on which Mr. Arthur had commenced his action. Because *Hill* and *Nelson* both involved demonstrably "last-minute" applications for relief, *Hill*, 126 S. Ct. at 2104; *Nelson*, 541 U.S. at 649, these cases provide insufficient guidance on what facts justify a court's application of the "strong equitable presumption." How many days before a scheduled execution date must a complaint be filed in order to be considered "last-minute" so as to trigger the presumption? How many years after the plaintiff's conviction becomes final? How many weeks or months after plaintiff's habeas proceedings conclude? By what standard does a court determine whether an action cannot be fully litigated without the entry of a stay?[6] At what point in the litigation must the need for an entry of a stay be evident in order for the presumption to apply? What factors constitute a "speculative" or "dilatory" action, *Hill*, 126 S. Ct. at 2104, and to the extent that "dilatoriness" requires evidence of a plaintiff's state of mind, what evidence suffices?

---

[6] The Eleventh Circuit supported its conclusion that Mr. Arthur could not fully litigate his claims without entry of a stay by citing the time it took another plaintiff with a factually and procedurally dissimilar case to litigate his action seeking DNA testing. (A53) Such a comparison disregards the inquiry into the equities involved in the case at bar that the *Nelson* court prescribed. 541 U.S. at 649-50.

Because *Hill* and *Nelson* left lower courts to their own devices in determining how and under what circumstances to apply the "strong equitable presumption" standard in the context of lethal injection cases, it is not surprising that the Courts of Appeal have applied disparate standards in determining when a § 1983 complaint is filed "too late in the day," resulting in inconsistent application of this Court's precedents. The Eleventh Circuit is alone in applying the "strong equitable presumption" to dismiss both lethal injection *and* DNA § 1983 claims if the death-sentenced plaintiff "unreasonably delayed" in bringing them and if such claims cannot, in the trial court's view, be fully litigated without entry of a stay. (A58); *Grayson* v. *Allen*, 491 F.3d 1318, 1325 (11th Cir. 2007). However, even in lethal injection cases, courts have not uniformly applied *Hill* and *Nelson*.

For example, consistent with the Eleventh Circuit, the Fifth and Eighth Circuits have applied a "strong equitable presumption" against the grant of a stay. *See Reese* v. *Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) ("a plaintiff cannot wait until a stay must be granted to enable [him] to develop facts and take the case to trial"); *Nooner* v. *Norris*, 491 F.3d 804, 809 (8th Cir. 2007) (proper inquiry "is whether [the plaintiff] could have brought his claim at such a time as to allow consideration of the merits without requiring entry of a stay") (internal quotation marks omitted).

In contrast, the Ninth Circuit has rejected the majority approach to the presumption, holding that courts should carry out a fact-specific inquiry "to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Beardslee* v. *Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005) (per curiam) (where plaintiff filed § 1983 complaint one month before his scheduled execution, district court erred in "applying a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent"). Instead of applying any equitable standard, the Sixth Circuit has adopted a statute-of-limitations rule to determine the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct review of his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 421–22 (6th Cir. 2007).

To prevent the execution of a potentially innocent man who has been deprived of the critical tools necessary to demonstrate his innocence, this Court should grant Mr. Arthur's petition for certiorari in order to clarify (1) whether the "strong equitable presumption" applies to actions brought by death-sentenced inmates pursuant to § 1983 seeking access to physical evidence for DNA testing, and (2) the standards courts must use to determine whether the presumption applies in a particular case.

II. The Court Should Grant Certiorari to Clarify That Application of a "Strong Equitable Presumption" to a Death-Sentenced Inmate's Section 1983 Action Requires a Careful Inquiry into the Facts and Equities of the Case.

"[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Ford* v. *Wainwright*, 477 U.S. 399, 414 (1986) (quoting *Solesbee* v. *Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). Implicit in the fundamental due process imperative is the requirement that the courthouse doors not be barred to a person subject to such a "life-and-death guess" merely because the claim he presses would require ancillary relief from the court if the merits of the claim are to be addressed. Mr. Arthur, like other death-sentenced inmates seeking access to evidence for DNA testing that could exculpate them, ultimately seeks to make the guess as informed as humanly possible. The court below applied the "strong equitable presumption" in such a way as to preclude that effort.

In affirming the dismissal of Mr. Arthur's Complaint, the Eleventh Circuit found timing dispositive:

> Although the equitable considerations in each case are naturally different, even if Arthur would have been entitled to a decision on the merits without the entry of a stay, the strong presumption against a stay operates against him.

(A55 (internal quotation marks omitted)) The Eleventh Circuit has therefore determined the "strong" presumption to be irrebuttable where the court has decided—based on no identified criteria—that a stay would have been necessary in order to litigate the case. Nothing in *Hill* or *Nelson* compels such a result.

This Court has indicated that courts applying the "strong equitable presumption" must, in addition to deciding whether the plaintiff has unreasonably delayed, determine whether the plaintiff meets the requirements for a preliminary injunction. *Hill*, 126 S. Ct. at 2104. Assuming *arguendo* that the "strong equitable presumption" applies to complaints such as Mr. Arthur's that seek DNA testing, this Court should grant certiorari to clarify that courts adjudicating such complaints must undertake the inquiry into the equities called for in deciding a preliminary injunction application. The equitable factors considered in such a decision include (1) the movant's likelihood of success on the merits; (2) the likelihood that movant will suffer irreparable injury if the request for preliminary injunction is denied; (3) the balance of hardships between the parties and

coupled against hardship faced by non-parties; and (4) the effect of a grant or denial of preliminary injunctive relief on public policy. *See* 13 James Wm. Moore *et al.*, Moore's Federal Practice § 65.22 (3d ed. 2007).

The Eleventh Circuit affirmed the dismissal of Mr. Arthur's action based on a cursory inquiry that ignored certain key factors entirely and made erroneous factual determinations as to others. Most critically, the court below erred in finding that Mr. had failed to show a likelihood of success on the merits.

A. Mr. Arthur Has Demonstrated a Likelihood of Success on the Merits.

The courts below concluded that Mr. Arthur could not show a likelihood of success on the merits of his claim because the federal habeas court already ruled that the physical evidence Mr. Arthur sought—and still seeks—"will not clearly exonerate him." (A54) While the evidence that Mr. Arthur seeks to subject to DNA testing is the same evidence that the habeas court considered, neither the habeas court nor the courts below grasped the potentially exculpatory force of DNA testing here. As recognized by former U.S. Attorney General John Ashcroft, DNA technology is "the truth machine of law enforcement, ensuring justice by identifying the

guilty and exonerating the innocent."[7] The ability of DNA testing to undermine wholly the confidence in the outcome of Mr. Arthur's trial is not speculative and demonstrates his likelihood of success on the merits.

In connection with its investigation of the murder of Troy Wicker, the State of Alabama collected various pieces of evidence. Mr. Arthur seeks to conduct DNA testing on the following:

Judy Wicker's Rape Kit. A rape kit was prepared when Judy Wicker was taken to the hospital shortly after the police arrived to investigate the murder, and the kit was sent to the State of Alabama's Department of Forensics. The rape kit created on the same day as the murder was never subjected to DNA testing. Indeed, the DNA testing that Mr. Arthur seeks to conduct (Short Tandem Repeat DNA testing) was not even available during his third trial.[8] Although the State of Alabama has argued that exculpatory DNA test results would not prove or disprove Mr. Arthur's guilt because he was not convicted of raping Judy Wicker, this argument ignores the fact that such results could confirm testimony from Judy Wicker's trial that an African-

---

[7] News Conference – DNA Initiative, March 4, 2002, http://www.usdoj.gov/archive/ag/speeches/2002/030402newsconferncednainitiative.htm (last visited Sept. 24, 2007).

[8] *See Commonwealth* v. *Rosier*, 812 685 N.E.2d 739, 743 (1997) (noting that Short Tandem Repeat DNA testing was not commercially available until "several years" after 1991).

American man burglarized the Wicker residence, assaulted Judy Wicker, raped her and then shot Troy Wicker.

DNA testing of the rape kit would do much more than merely show that Mr. Arthur did not rape Judy Wicker. Such testing could identify the real perpetrator. The advent of national DNA databanks has allowed law enforcement officials to solve thousands of "cold cases," some of them decades old and with no other leads or suspects until a match in the databank points to the perpetrator. The FBI's Combined DNA Index System ("CODIS") integrates DNA profiles gathered at the state and local levels into a national DNA database.[9] This database contains over 4.7 million convicted offender DNA profiles and over 183,441 DNA profiles from unsolved cases.[10] Each profile consists of a unique set of DNA identification characteristics.

---

[9] Alabama passed legislation in 1994 that initiated the creation of a DNA databank that brought the State into the CODIS network. Alabama has collected DNA samples from every person convicted of a felony or other enumerated offenses since May 6, 1994, as well as every person confined on a felony conviction as of May 6, 1994. Ala. Code § 36-18-24 (2007). The express purpose of collecting and maintaining such data is to aid in identifying perpetrators and exonerating the innocent. Ala. Code §§ 36-18-20, 36-18-22 (2007).

[10] *See* CODIS, "National DNA Index System," at http://www.fbi.gov/hq/lab/codis/national.htm (last visited Sept. 24, 2007).

If the results from Judy Wicker's rape kit matched the DNA profile of a convicted felon from the CODIS database, such match would completely undermine confidence in Mr. Arthur's conviction. The circumstantial evidence against Mr. Arthur cannot withstand DNA test results demonstrating that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fits the description of her husband's murderer that she provided during her own trial. Indeed, Short Tandem Repeat DNA testing can conclusively prove innocence by identifying the true perpetrator —even in cases where a mere exclusion could not conclusively prove innocence—by developing a profile that could provide a "cold hit" in the DNA database.[11]

Hairs and a Wig from Judy Wicker's 1981 Buick Riviera. The State recovered hairs and a wig from Judy Wicker's 1981 Buick Riviera and sent them to the State's Department of Forensics for microanalysis. Fingerprints found in the automobile were tested but did not match those of Mr. Arthur. At trial, the State's representative, John Kilbourn, testified that the hair samples were "Negroid hair . . . forcibly removed." Such evidence is

---

[11] *See, e.g.*, Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, New York Times, Sept. 21, 2006, at B1 (Jeffrey Deskovic); Jim Yardley, *Texas Inmate's Confession Slips Through the Cracks*, New York Times, Oct. 17, 2000, at A20 (Christopher Ochoa and Richard Danziger).

consistent with Judy Wicker's description at her own trial that the perpetrator was African American. DNA testing on such hair could also match the DNA profile of a person fitting this description from the CODIS database. Furthermore, although Judy Wicker testified that Mr. Arthur had disguised himself by wearing a wig (T.R. 759), Kilbourn did not find any hair inside the wig as would be expected if it had been worn. DNA testing of this wig could confirm that Mr. Arthur's DNA was not in the wig.

Judy Wicker's Clothing. The State submitted Judy Wicker's blood-stained clothing and ripped undergarments to the State's Department of Forensics, but these items were not tested for blood typing or DNA. At trial, the prosecution argued that Judy Wicker and Mr. Arthur concocted a story that she had been assaulted by an African-American man who then killed Troy Wicker, but that it was actually Mr. Arthur who had assaulted her and killed her husband. The fact that Judy Wicker's clothing was torn and stained with blood suggests that there was a struggle, and it is highly possible that the perpetrator left traces of DNA in the form of blood or skin cells on Judy Wicker's clothing and on her undergarments during the rape. DNA testing of such items could confirm that Judy Wicker testified truthfully when she stated that a burglar—not Mr. Arthur—assaulted her and killed Troy Wicker.

Den Floor Vacuum Sweepings and Hairs. Vacuum sweepings from the den floor and hairs from a shoe were collected from the Wicker residence and submitted to Kilbourn. These sweepings consisted of numerous hairs and fibers, none of which were matched to Mr. Arthur. Testing the hairs to determine whether they match the other items could further demonstrate that a burglar was present in the Wicker residence on the morning of the murder.

In sum, DNA testing could demonstrate that Judy Wicker was raped by someone with a criminal record whose description is consistent with her testimony from her own trial. In other words, comparing the test results of the rape kit to the CODIS database could result in a match with a known offender convicted of a violent crime, and confirm that Judy Wicker was telling the truth when she testified that this burglar assaulted her and killed Troy Wicker.

Furthermore, DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, and that this person was not Mr. Arthur. Not only can such testing exclude Mr. Arthur, redundant DNA test results—establishing the same genetic profile on multiple pieces of evidence—are critical to establishing the identity of the perpetrator

of the crime.[12] A match to a convicted offender profile of a person who had no reason to be in the Wicker residence on the morning of the murder would confirm that Judy Wicker testified truthfully when she stated that a burglar killed Troy Wicker. Indeed, nowhere in Judy Wicker's testimony did she allow for the possibility that two persons killed Troy Wicker. Thus, DNA testing could provide powerful evidence of Mr. Arthur's innocence by demonstrating that the same person, *i.e.* the real perpetrator, is the source of DNA on multiple pieces of evidence.

For all of these reasons, Mr. Arthur has shown a likelihood of success on the merits of his claim, and the court below erred in concluding that his Complaint was properly dismissed.

B. Mr. Arthur Did Not Unreasonably Delay in Bringing His § 1983 Complaint.

In affirming the District Court's finding that Mr. Arthur unreasonably delayed in filing his Complaint, the Eleventh Circuit noted the number of years that have elapsed since (i) the crime occurred, (ii) Mr. Arthur was convicted, (iii) his direct review

---

[12] Redundant DNA test results such as those that may be obtained here have served as the basis for numerous post-conviction DNA exonerations. *See, e.g., Yarris* v. *County of Delaware*, 465 F.3d 129, 132-33 (3d. Cir. 2006) (Nicolas Yarris); Kim North Shine, *DNA Tests Exonerate Man; After Nearly A Decade in Prison, Suspect Is To Be Set Free*, Detroit Free Press, June 12, 2003, at 1B (Kenneth Wyniemko).

had concluded, (iv) his state post-conviction proceedings concluded, and (v) his filing of his federal habeas petition. (A54) Such an attempt to characterize the timing of Mr. Arthur's § 1983 action as "unreasonable delay" on the part of Mr. Arthur is unwarranted.

First, it is inaccurate to state or imply that Mr. Arthur has been able to control the course or pace of his criminal or his post-conviction proceedings. Mr. Arthur cannot be faulted that his first two trials were overturned due to constitutional violations. Nor can he be faulted for the time that it took for his habeas petition to be adjudicated: the Eleventh Circuit decided his appeal of the denial of his petition nearly three years after Mr. Arthur filed his appellant's brief.

Second, the district court's finding of unreasonable delay ignored the fact that other litigation was ongoing. The court criticized Mr. Arthur for not having filed his Complaint while simultaneously litigating a habeas petition, the granting of which would have obviated the need for the instant action. (A33) It was reasonable for Mr. Arthur, in the interest of conserving judicial resources and avoiding multiple lawsuits pursuing the same relief, to wait until such litigation had concluded before commencing the instant action. It would have been more unreasonable, in fact, for Mr. Arthur to have ignored the important interest in

conserving scarce judicial resources and pursued the inefficient course of action proposed by the court.

Third, in stating that Mr. Arthur should have sought access to DNA testing earlier because he "has been able to see [sic] evidence through a § 1983 action for at least five years" (A54), the Eleventh Circuit ignored the fact that DNA testing methods have become both more widely available and more sensitive, precise and accurate in both identifying individuals and eliminating individuals as suspects. Had Mr. Arthur sought DNA testing earlier, the value of the results would likely not have been as great as they would be today.

Fourth, it simply cannot be correct that Mr. Arthur "unreasonably delayed" in seeking relief because a stay would need to be entered in order for the merits of his claims to be adjudicated. (A53) At the time Mr. Arthur filed his Complaint, there was no execution date pending; no need for a stay could even arguably have arisen until the execution date was actually set—more than two months after the action was commenced. Such an *ex post* analysis is both illogical and unfair to Mr. Arthur, as it would be to any litigant who faces such retroactive foreclosure of his claims.

C. The Court Failed to Consider the Critical Issue of the Public Interest.

"The quintessential miscarriage of justice is the execution of a person who is entirely innocent."

Schlup v. *Delo*, 513 U.S. 298, 324-25 (1995). Where the possibility of such outcome is present, as it is here, the public interest is indisputably implicated. It was thus error for the courts below to disregard this equitable factor in determining that the balance of the equities militated for the dismissal of Mr. Arthur's Complaint. Indeed, the very application of the "strong equitable presumption" to defeat the request of a condemned man for evidence that could exonerate him evokes public policy issues, including the public's confidence in the integrity of our justice system. "It is critical that the moral force of the criminal law not be diluted by [procedures] that leave[] people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. 358, 364 (1970). Because the Eleventh Circuit is alone in having extended the "strong equitable presumption" to the context of actions seeking DNA testing, the court's failure to consider the public policy ramifications of its decision was error.

CONCLUSION

For all of the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Suhana S. Han
Counsel of Record
Sara L. Manaugh
Jordan T. Razza
Sultana L. Bennett
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner
Thomas D. Arthur

September 25, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS D. ARTHUR,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 2:07-cv-319-WKW
	)	
TROY KING, *et al.*,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Thomas D. Arthur is an inmate convicted of capital murder and sentenced to death. Arthur brings this § 1983 complaint against Troy King, the Attorney General for the State of Alabama; Bryce U. Graham, Jr., the district attorney for Colbert County, Alabama; Ronnie May, sheriff for Colbert County, Alabama; and M. David Barber, the district attorney for Jefferson County, Alabama (collectively the "defendants"), to receive access to specific material collected at the crime scene for DNA and other testing. On May 18, 2007, the defendants filed a Motion to Dismiss (Doc. # 8) pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the court will GRANT the defendants' Motion to Dismiss.

I. FACTS AND PROCEDURAL HISTORY

A. Facts

Arthur was convicted and sentenced to death for the February 1, 1982 murder of Troy Wicker ("Troy"). It is relevant to Arthur's Section 1983 complaint to briefly discuss the evidence presented at his December 5, 1991 trial.[1]

On February 1, 1982, police officers found Troy's body in his Muscle Shoals home with a gunshot wound to his right eye. At the scene were an injured Judy Wicker ("Judy"), Troy's wife, and Teresa Rowland ("Teresa"), Judy's sister. Judy was taken to the hospital where a rape kit was prepared. An investigator with the police department later questioned Judy at the hospital regarding her husband's murder. She stated that an African-American man burglarized her home, raped her, knocked her unconscious, and shot her husband. The police gathered various pieces of evidence at the crime scene, including Judy's clothing, vacuum sweepings, a hair sample, spent gun cartridges, a pillowcase, and fingerprints. Officers later discovered Judy's 1981 Buick Riviera in an abandoned lot and recovered a wig, hair samples, and fingerprints from the car.

The police investigated Judy for the murder of her husband and concluded that she paid Arthur to

---

[1] The opinion of the Alabama Court of Criminal Appeals in *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), contains an in-depth reiteration of the evidence in Arthur's trial.

murder Troy to collect the proceeds of a $90,000 life insurance policy. At her trial for murder, she maintained her innocence, and her testimony concerning the intruder was consistent with that given to the investigator. The jury disbelieved her testimony, and she was convicted of murder and sentenced to life in prison. However, at each of Arthur's three trials, Judy testified that she hired Arthur to kill her husband, providing detailed testimony about Arthur's role in the murder. She stated that she began to converse with Teresa about killing Troy in early 1981. Theron McKinney ("Theron"), Teresa's husband, was also party to these conversations. Judy acknowledged that she had known Arthur from her days of working at Tidwell Homes, and they had been having sexual relations. On the day of the murder, Judy dropped off her sons at school and twice drove across Avalon Avenue. Judy then met Teresa and Arthur at the airport. Judy testified that Arthur had blackened his face and was wearing a wig so as to look like an African-American. Further, Arthur had a gun and was carrying a garbage bag. All three individuals concocted a plan in which Judy would say that her home had been burglarized and she was assaulted by a black man. After her husband was murdered, Judy paid Arthur $10,000 and Teresa $6,000, and provided jewelry and an automobile to Theron for his role in the plan. Arthur alleges the prosecutor agreed to put in a good word with the parole board if Judy would offer helpful testimony in Arthur's trial.

In addition to Judy, the State of Alabama offered the testimony of thirteen witnesses at Arthur's third trial. Sergeant Eddie Lang, a Muscle Shoals police officer, testified that he observed Judy passing

Avalon Avenue twice on the day of the murder. Joseph Wallace testified about his observations of the crime scene and the items that were recovered from the Buick. Debra Tynes testified that Arthur was late for a lunch appointment with her on the day of the murder. Later that day, Tynes and Arthur drove across the Tennessee River Bridge. Tynes testified that Arthur stopped the car and threw a plain black garbage bag wrapped in a sheet into the river. Arthur stated, "I want to get rid of some old memories." *Arthur v. State*, 711 So. 2d 1031, 1044 (Ala. Crim. App. 1996). Talmadge Sterling and Pat Halliday, respectively a correctional officer and an employee of the Decatur Work Release Center, both testified as to Arthur's residency at the Center. Sterling stated that Arthur clocked out for work at 6:00 a.m., on the morning of the murder. At 7:10 p.m., Arthur called for a ride back, and at 7:50 p.m. he returned to the Center. Arthur was assigned through the Center to work at Reagan Mobile Homes, but owner Joel Reagan testified that he did not know of Arthur's whereabouts on the day of the murder.

Halliday testified about a subsequent discrepancy in Arthur's payroll records resulting in Arthur being transferred to the Morgan County Jail. On inspection of his effects, officers at the Morgan County Jail found twenty one hundred dollar bills in his coat pocket. Pat Yarbrough Green, an employee at Cher's Lounge, testified that she knew Arthur because he frequented the lounge. On the day before the murder, Green stated that Arthur asked her if she could obtain .22 caliber long rifle bullets for him. Green asked a third party to obtain the bullets, and Arthur paid her ten dollars when she delivered the

bullets to him. Green also testified that Arthur told her that "[s]omeone will be killed in Tennessee. Don't worry, it won't be traced to us." *Arthur*, 711 So. 2d at 1044. Arthur also asked Green if she could get him some "jars" or "knockout pills." *Id.* Brent Wheeler, a forensic scientist, testified that the bullet found in Troy's body was a .22 long rifle bullet. Moreover, he stated that the spent casings were .22 long rifle. Dr. Pirl, a toxicologist, stated that there was neither ethanol nor narcotics in Troy's body. However, he stated that there could have been, although he was unsure, a drug called scopolamine in Troy's system at the time of his death. Scopolamine is commonly referred to as "juars" or "jars." *Id.* at 1051.

At Arthur's insistence, Arthur represented himself at the third trial, with attorney Henry Walden and Walden's son as co-defense counsel.[2] The team called four witnesses. Ronald Spears, an inmate at West Jefferson prison, testified that Green told him that "[t]he cops told me to lie on Tommy re[garding] the .22 bullets." *Id.* at 1045. Arthur offered inconsistent explanations for the cash found in his pocket after the murder. Bruce Carrol, an inmate at St. Clair prison, testified that he lost $6,500 to Arthur in a poker game. Gene Moon, a resident of Cullman County Jail, stated that an inmate gave him $2000, and Moon slipped it in the coat pocket of Arthur.

At the conclusion of the case, the jury convicted Arthur of the murder of Troy. Arthur's crime was considered "capital because he had previously been

---

[2] This was a sort of "hybrid representation," as described by the Alabama Court of Criminal Appeals. *Arthur*, 711 So. 2d at 1045.

convicted of murder in the second degree in 1977 . . . and . . . for intentionally causing the death of Troy Wicker by shooting him with a pistol for pecuniary or other valuable consideration . . . ." *Id.* at 1043 (internal citations omitted). At the sentencing phase of Arthur's trial, Walden asked the jury to sentence Arthur to life in prison. However, Arthur followed Walden and asked the jury to sentence him to death. The jury, by a vote of 11-1, sentenced Arthur to death for Troy's murder. The conviction and death sentence were affirmed by the Alabama Supreme Court in 1997. *See Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997).[3]

B. Procedural History

February 1, 1982:	Troy Wicker found murdered at his Muscle Shoals Home.
February, 1982:	Arthur was convicted of murder and sentenced to death.
May 10, 1985:	The Alabama Supreme Court reversed Arthur's first conviction. *Ex parte Arthur*, 472 So. 2d 665 (Ala. 1985).
May 13, 1987:	Arthur was convicted again of murder and

[3] This was Arthur's third conviction for Troy's murder, and his third death sentence.

sentenced to death.

May 25, 1990: The Alabama Court of Criminal Appeals reversed Arthur's second conviction. *Arthur v. State*, 575 So. 2d 1165 (Ala. Crim. App. 1990).

December 5, 1991: Arthur's third trial resulted in another guilty verdict and recommendation of death.

January 24, 1992: The trial court sentenced Arthur to death.

March 8, 1996: The Alabama Court of Criminal Appeals affirmed Arthur's conviction and death sentence. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996).

November 21, 1997: The Alabama Supreme Court affirmed the Court of Criminal Appeals' decision. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997).

January 25, 2001: Arthur filed a Rule 32 Petition in the Circuit Court of Jefferson

	County, Alabama.
March 5, 2001:	The Circuit Court of Jefferson County dismissed the Rule 32 petition as being untimely.
March 23, 2001:	The Alabama Supreme Court set April 27, 2001, as Arthur's execution date.
March 28, 2001:	Arthur filed a motion to reconsider the denial of his Rule 32 motion.
April 20, 2001:	Arthur filed his Petition for Writ of Habeas Corpus and motion to stay the execution in the Northern District of Alabama.
April 25, 2001:	The Northern District of Alabama stayed the execution date.
April 25, 2001:	The Alabama Court of Criminal Appeals affirmed the denial of Arthur's Rule 32 petition. *Arthur v. State*, 820 So. 2d 886 (Ala. Crim. App. 2001).

November 2, 2001:	The Alabama Supreme Court denied certiorari on the Rule 32 petition.
May 13, 2002:	The United States Supreme Court denied certiorari on the Rule 32 petition.
December 4, 2002:	Judge Edwin Nelson of the United States District Court for the Northern District of Alabama denied Arthur's Habeas petition as being untimely.
December 18, 2002:	Arthur filed a motion for reconsideration of Judge Nelson's denial.
June 5, 2003:	Judge Scott Coogler of the United States District Court for the Northern District of Alabama denied Arthur's motion for reconsideration.
August 6, 2003:	Arthur filed a motion for a certificate of appealability.
August 11, 2003:	The United States District Court for the Northern District of

	Alabama granted Arthur's certificate of appealability.
June 21, 2006:	The Eleventh Circuit affirmed the district court's denial of Arthur's habeas petition. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006).
August 14, 2006:	The Eleventh Circuit modified its June 21, 2006 opinion. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).
April 12, 2007:	Arthur filed the instant § 1983 complaint seeking access to various pieces of evidence to have it tested for DNA and other testing.
April 16, 2007:	The United States Supreme Court denied certiorari in *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).
June 22, 2007:	The Alabama Supreme Court set Arthur's execution date for September 27, 2007.

II. STANDARD FOR DISMISSAL

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8: " a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal of an unnecessarily delayed § 1983 action by a death row inmate can be an appropriate remedy. *See Grayson v. Allen*, __ F.3d __, No.07-12364, 2007 WL 2027903 (11th Cir. July 16, 2007).

III. DISCUSSION

On April 12, 2007, over fifteen years after his third conviction for the capital murder of Troy, Arthur filed this § 1983 action seeking access to biological and other evidence used at trial. Arthur's complaint alleges that the failure or refusal of the defendants to provide the evidence he requests is a violation of his Fourteenth Amendment right to due process, his Eighth Amendment right not to be subjected to cruel and unusual punishment, his right to access to the courts, and his clemency rights. Defendants argue that Arthur's § 1983 complaint should be dismissed for a variety of reasons, including that he has no constitutional right to post-conviction DNA testing, that his claim is barred by the two year statute of limitations and that his claim is barred by laches. Arthur's execution date is set for September 27, 2007, which raises the issue of whether the merits of this case can be fully litigated without the entry of a stay of execution. The consideration of Arthur's right to a stay in order to

fully adjudicate the merits of his claim disposes of the motion before the court.[4]

The considerations surrounding the granting of a stay of execution in § 1983 cases are well and recently established in the Eleventh Circuit. This is an equitable exercise. "[W]here petitioner's scheduled execution is imminent, there is no practical difference between denying a stay on equitable grounds and denying injunctive relief on equitable grounds in a § 1983 lawsuit." *Rutherford v. Crosby*, 438 F. 3d 1087, 1092 (11th Cir. 2006) (*Rutherford I*), *vacated on other grounds, Rutherford v. McDonough*, __ U.S. __, 126 S. Ct. 2915 (2006) (mem.).[5] "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 1090-91 (citation omitted). The Supreme Court recognized that federal courts "have invoked their equitable powers to dismiss [§ 1983] suits they saw as speculative or filed too late in the day." *Hill v. McDonough*, __ U.S. __, 126 S. Ct. 2096, 2104 (2006). "While the Supreme Court did not pass judgment on these § 1983 cases, it recognized the 'significant' problem created by such delay and stated that 'federal courts can and should protect States from

---

[4] Because the court has determined that Arthur is not entitled to a stay of execution to litigate his claims, the court need not address the merits of the defenses of statute of limitations and laches.

[5] *Rutherford* was a challenge to the method of execution case. In the analysis of equitable considerations, the court finds no logical or precedential reason to treat a § 1983 request for injunctive relief for purposes of DNA or other testing any differently than a § 1983 challenge to the method of execution.

dilatory or speculative suits . . . .'" *Grayson*, 2007 WL 2027903, at * 3 (quoting *Hill*, 126 S. Ct. at 2101). "[B]efore granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). As will be seen, Arthur's request cannot be litigated without entry of a stay of execution. Arthur fails to overcome the strong equitable presumption against the grant of a stay.[6]

Nine weeks after this action was filed, the Alabama Supreme Court set Arthur's execution date for September 26, 2007. Although Arthur has not requested a stay of execution, he also has not

---

[6] In two recent decisions in this district, death row inmates filed their respective § 1983 complaints alleging that Alabama's method of execution is unconstitutional. *Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007), *aff'd* 485 F.3d 635 (11th Cir. 2007); *Grayson v. Allen*, No. 2:06-cv-1032-WKW, 2007 WL 1491009 (M.D. Ala. May 21, 2007), *aff'd* __ F.3d __, No. 07-12364 (11th Cir. July 16, 2007). In *Jones*, Judge Myron Thompson denied an inmate's motion to stay his execution because he was dilatory in bringing his challenge. 483 F. Supp. 2d 1142. The inmate filed his complaint "nearly 28 years after he was first found guilty of capital murder and sentenced to death . . . [and] six years after he filed his habeas petition . . ." *Id.* at 1152. In *Grayson*, this court found that an inmate who waited twenty-five years after he was first found guilty and ten years after filing his habeas petition was dilatory in bringing his claim. 2007 WL 1491009. Although the decision to grant a stay is not strictly a comparison of delays in other cases, it is the duty of the court to ascertain whether Arthur has been dilatory in filing his § 1983 claim for post-conviction access to DNA and other testing, and in view of his delay, whether he can establish that a stay is warranted.

requested expedited action on his complaint. His complaint comes late in the litigation day, after the exhaustion, over the span of twenty-five years, of all state and federal avenues of relief, including direct appeal (two of which successfully resulted in reversals and new trials) and collateral appeal in state court, and a habeas action in federal court, just concluded in August 2006. In this circuit, consideration of the merits of a § 1983 action brought by a death row inmate means full adjudication, entailing a sufficient period to conduct discovery, depose experts, and litigate the issues on the merits, including any appeals. *Jones v. Allen*, 483 F. Supp. 2d at 1152. "Where full adjudication is not possible, the result is either a stay or an execution." *Grayson*, 2007 WL 1491009, at * 4. As will be seen, there is no guaranteed right to trial evidence for DNA testing in this circuit for an inmate in Arthur's procedural posture. Even though Arthur requests only injunctive relief (Compl. ¶ 10), the court finds, for reasons that appear below, that it would take many more months, if not years, to fully litigate this claim in its present posture.[7] A stay of execution is therefore implicated, and the court will address the equitable considerations raised: Arthur's likelihood of success on the merits, the relative harm to the parties, and the delay in bringing the action.

---

[7] At the habeas stage, which included the same issue raised in this § 1983 action, Arthur's case required five years for resolution in the district and circuit courts.

A. Likelihood of Success

Arthur cannot demonstrate a substantial likelihood of success on the merits in his DNA and other testing claim. He has not demonstrated that he has a constitutional right to such testing in the circumstances presented here, and his claim to such testing has been previously considered by other courts and rejected. Each of the constitutional grounds advanced by Arthur will be examined in turn, followed by a review of the actions of other courts on Arthur's previous request for access to the same evidence requested here.

1. Due Process Right to DNA Testing

The defendants argue that Arthur has no procedural or substantive due process right to post-conviction DNA testing pursuant to the Eleventh Circuit's opinion in *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006), and that such claim should be summarily dismissed. Arthur responds that his is an extraordinary case and is distinguishable from the facts of *Grayson*. Moreover, Arthur avers he has more than adequately stated a claim under both *Brady v. Maryland*, 373 U.S. 83 (1963), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court finds that Arthur's case is not so extraordinary as to fall outside the holding of *Grayson*, and, similarly, that he does not have a due process right to post-conviction DNA testing under *Brady* or the balancing test of *Mathews*.

a. Brady v. Maryland

The Eleventh Circuit, in interpreting *Brady*, has held that "[t]he *Brady* rule is grounded in a defendant's right to a fair trial." *Grayson*, 460 F.3d at 1337. The cornerstone question of a *Brady* violation is whether the prosecution withheld material evidence from the defense. *See Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In *Grayson*, the Eleventh Circuit held that a death row inmate did not have a due process right under *Brady* to obtain evidence, post-conviction, for DNA testing. Darrell Grayson and Victor Kennedy burglarized the home of Mrs. Annie Laura Orr, repeatedly raped her, and suffocated her with a pillowcase. Grayson filed a § 1983 complaint asking for DNA evidence pursuant to *Brady* and its progeny. The Eleventh Circuit held that Grayson did not have a post-conviction right to DNA testing. The crux of the Eleventh Circuit's holding was that Grayson made no argument that the alleged exculpatory evidence was suppressed at trial; he had freely admitted his guilt as to his role in the crime; the DNA testing would not exonerate him, even if it produced a favorable result; and there was overwhelming evidence, outside of his confession, of Grayson's role in the murder of Mrs. Orr. While the Eleventh Circuit specifically stated that its decision did "not foreclose the possibility that a § 1983

plaintiff could, under some extraordinary circumstances, be entitled to post-conviction access to biological evidence for the purpose of performing DNA testing," *Grayson*, 460 F.3d at 1340, this court does not find that Arthur's case is one of those with extraordinary circumstances to which the Eleventh Circuit alludes.

First, like Grayson, Arthur does not argue that the evidence he wishes to test for DNA was suppressed by the prosecution, either in bad or good faith, at his trial. On the contrary, the evidence, according to Arthur's complaint, was submitted by the prosecution to the state forensics lab and some was placed into evidence at the trial. There is no assertion by Arthur that the prosecution ever received a DNA report on the evidence in question and withheld it from the defense. Second, the *Brady* decision is grounded upon a defendant's right to a fair trial, and from a review of the opinions of the Alabama Supreme Court, the Alabama Court of Criminal Appeals, the Northern District of Alabama, and the Eleventh Circuit Court of Appeals, all of which analyzed the evidence submitted at the third trial, there is no reason to conclude that there was a *Brady* violation resulting in an unfair trial. Third, there was overwhelming evidence linking Arthur to Troy's murder. Although she was the prosecution's most important witness, Judy was not the only witness that the jury heard. Thirteen witnesses testified for the State, many of whom corroborated Judy's testimony. Various witnesses testified to events outside of Judy's testimony that implicated Arthur in Troy's murder. Of particular interest is the testimony that twenty one hundred dollar bills were found in Arthur's coat pocket after Troy's

murder; that Tynes observed Arthur throw a garbage bag into the Tennessee River on the day of the murder in order to "get rid of some old memories;" that Green obtained .22 long rifle bullets for Arthur on the day before the murder; that Arthur told Green that someone would be murdered; that the bullet found in Troy's body and the shell casings found at the scene were from .22 long rifle bullets; and that Reagan could not testify as to the whereabouts of Arthur on the day of Troy's murder. Even though these and other witnesses recalled various events involving Arthur on the day of and days leading up to the murder, he maintains that no direct evidence was ever discovered that directly placed him at Troy's murder. This argument fails because direct evidence is not necessary for prosecution and conviction; circumstantial evidence is sufficient. *See Hallford v. Culliver*, 459 F.3d 1193, 1201 (11th Cir. 2006) (citing *McMillian v. State*, 594 So. 2d 1253, 1263 (Ala. Crim. App. 1991)).

Fourth, like Grayson, Arthur cannot establish that DNA testing, even if the testing results in a favorable outcome, will exonerate him of murder. In his reply brief, Arthur states that DNA testing "*could* . . . shed light on Mr. Arthur's guilt or innocence by demonstrating that he was nowhere near the Wicker residence on the morning of the murder." (Arthur's Reply Br. at 10 (emphasis added).) Arthur postulates that the DNA evidence "*could* discredit entirely the only direct testimony linking Mr. Arthur to the murder, because Judy Wicker's testimony does not allow for the possibility that two persons killed Troy Wicker." (*Id.* (emphasis added).) However, Arthur's argument ignores the testimony of the other thirteen witnesses who either corroborated Judy's testimony

or offered other incriminating insight into the murder. The best result that Arthur could hope for is that the DNA evidence does not show that he raped or assaulted Judy. Arthur, though, was not convicted of the rape or assault of Judy. The discrediting of Judy's testimony would not exonerate Arthur of Troy's murder or undermine confidence in the conviction of Arthur in view of the evidence otherwise linking him to the murder.[8]

Finally, unlike Grayson, Arthur argues that he has asserted his innocence since his conviction. Although Grayson confessed to the murder of Mrs. Orr, Arthur's assertion of innocence is irrelevant in the analysis of an alleged *Brady* violation. As stated previously, *Brady* speaks only to the suppression of material evidence by the prosecution that, if disclosed, would have undermined confidence in the defendant's conviction. *Brady* is not grounded in whether a defendant asserts his innocence or confesses his guilt.

In sum, Arthur fails to establish a due process basis for his testing claims under *Brady*.

---

[8] As discussed *infra*, Judges Nelson and Coogler rendered a detailed analysis of the evidentiary value of any DNA or other testing requested by Arthur in his motion for discovery in the habeas proceeding, item by item, concluding that "Arthur's conjectures about the relevance of the evidence to his claim of actual innocence fall far short of specific allegations showing reasons to believe that the fully developed facts might entitle him to relief." *Arthur v. Haley*, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003) (citation and internal quotation marks omitted).

b. Mathews v. Eldridge

Arthur next argues that he has a procedural due process right to DNA testing under the holding of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Arthur postulates that, absent Judy's testimony, only circumstantial evidence implicated him in the murder of Troy, and that DNA evidence *could* call into question his conviction. Defendants respond that the evidence that Arthur murdered Troy is "overwhelming," and that the State has an interest in the finality of convictions. (Defs.' Reply Br. to Pl.'s Resp. Br. at 11.)

"*Mathews* applies only where an individual has a liberty or property interest that the government seeks to eliminate, and the *Mathews* test concerns the administrative procedures required." *Grayson*, 460 F.3d at 1340.

> [W]here the government seeks to deprive an individual of such an interest, the courts must consider the following factors in determining what administrative safeguards are required: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335).

The *Grayson* court assumed that the inmate had a liberty interest in his life, and rightly so. However, the court affirmed the district court's decision that Grayson did not have a procedural due process right to DNA testing because the second and third *Mathews* factors weighed against him. Similarly, the court acknowledges Arthur's liberty interest in his life but finds that the second and third *Mathews* factors weigh against Arthur in his present complaint.

The second *Mathews* factor – "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" – weighs against Arthur's claim. Arthur has had three trials and three convictions that resulted in death sentences (two convictions were reversed in state court proceedings); state and federal habeas proceedings; and a stay of execution. Arthur has been litigating his convictions for at least twenty-five years; two federal district judges and the Eleventh Circuit weighed the merits of his habeas proceeding; and both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed his third conviction. The procedural safeguards in place and afforded to Arthur for twenty-five years of litigation are sufficient for the protection of his liberty interest. *See Grayson*, 460 F.3d at 1341 (holding that the procedural safeguards afforded to Grayson were sufficient when "[h]is liberty interest in his life was already litigated extensively for twenty years"). The same procedural safeguards afforded Grayson were exactly those afforded to Arthur.

The inherent value of an additional safeguard, *i.e.* DNA testing, coupled with Arthur's litigation record and the weight of the evidence against him, is small. Arthur seeks only to discredit the veracity of the testimony of Judy with the speculative results of DNA evidence. As stated previously, the circumstantial evidence linking Arthur to Troy's murder is, even if not characterized as overwhelming, more than enough to withstand a favorable DNA result.

The third prong – the government's interest and the burdens of the additional safeguard of DNA testing – also weighs against Arthur's claim. The Eleventh Circuit recognized that the government had "[c]ompelling interests - e.g., guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors," which outweighed Grayson's request for DNA testing of trial evidence. *Id.* at 1342. Arthur argues that the compelling interests of the State are overshadowed by the execution of the innocent. The court agrees with that statement in the hypothetical, but not with its application to Arthur. Arthur has had over fifteen years to litigate this death sentence and to persuade a court to accept his arguments, both about actual innocence and the need to test the evidence he now requests. Arthur now asks this court to overlook the decisions of other courts in their extensive review of his conviction and the review of the very same claims he now makes. The State has significant interests, discussed more fully in subsection III.B., which outweigh those advanced by Arthur. The court concludes that Arthur has no likelihood of success under the *Mathews* analysis.

His due process arguments therefore fail to establish any likelihood of success on the merits.

2. Cruel and Unusual Punishment

Arthur argues that the refusal of the State to provide him with the requested evidence is violative of the Eighth Amendment and constitutes cruel and unusual punishment. The defendants respond that the Eighth Amendment does not apply to requests for DNA tests. The court finds no precedent to suggest that the denial of Arthur's requested evidence is violative of the Eighth Amendment.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. Neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals has extended the Eighth Amendment's protections against cruel and unusual punishment to DNA testing. Accordingly, the court refuses to singularly extend the Eighth Amendment to Arthur's claim. The court therefore finds no likelihood of success on the final merits on the basis of cruel and unusual punishment arguments.

3. Right of Access to Courts

Arthur claims that his right of access to courts has been violated because the defendants have refused to provide him access to evidence for DNA testing and the results of the testing of the evidence *could* hold the key to his innocence. The State responds by arguing that Arthur's injury is speculative. The court agrees that Arthur has failed to establish a claim under the right of access to courts doctrine.

It is clearly established that under the Fourteenth Amendment a prisoner has "a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). *Bounds* and its progeny forbid the interference by state officials with an inmate's right to state a legal claim and have that claim reviewed by a court. This right, however, like any alleged violation of a constitutional right, has been interpreted to require actual injury to the prisoner. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) (holding that the actual injury requirement of *Bounds* is derived from the doctrine of standing). Further, "a litigant asserting an access claim must also prove that he has a colorable underlying claim for which he seeks relief. The right is ancillary to the underlying claim. Thus, the plaintiff must identify within his complaint, a "'nonfrivolous,' 'arguable' underlying claim." *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006) (internal citations omitted).

The fatal flaw in Arthur's argument is that he does not present an underlying claim in which his right of access to courts has been denied. Because the right of access to courts doctrine is secondary to the underlying claim, Arthur must first establish that he has a right to DNA testing before he can claim that state officials interfered with that right. Arthur has not established that he has such a right under any of the legal theories propounded in his complaint. Accordingly, Arthur has failed to establish a likelihood of success under the access to courts doctrine.

4. Clemency

Arthur claims that his right to clemency proceedings will be hampered if he is not granted access to evidence for DNA testing, and that the denial of such evidence renders the clemency process arbitrary and thus a violation of due process afforded by the Fourteenth Amendment. The defendants argue that executive clemency is vested in the Governor without recourse in the courts. The court finds that even if the State denies the requested evidence, Arthur has not shown that clemency proceedings under Alabama's constitutional scheme are violative of the Fourteenth Amendment.

The Alabama Constitution provides: "The governor shall have power to grant reprieves and commutations to persons under sentence of death." Ala. Const. art. V, § 124. Under this Amendment, "only the Governor has the power to grant reprieves and commutations to persons under sentence of death. . . ." *Liddell v. State*, 251 So. 2d 601, 606 (Ala. 1971). Under the due process clause, "some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (plurality opinion) (O'Connor, J., concurring).

Arthur argues that "[d]efendants' refusal to permit Mr. Arthur to access to [sic] the physical evidence within their control and to test that evidence, which is irrefutably pertinent to his

clemency application, renders the clemency process wholly arbitrary . . . ." (Pl.'s Reply Br. to Defs.' Mot. Dismiss at 25.) Arthur, however, does not establish and cannot establish how the denial of the evidence renders the clemency proceedings arbitrary. Arthur is permitted, unlike the hypotheticals offered by Justice O'Connor, to access the clemency process. Arthur further suggests that under Alabama Code § 12-17-184(16), the State has a duty to provide to the Governor all pertinent information at clemency hearings, which Arthur contends includes the requested DNA testing. Arthur interprets the statute more broadly than is required. To sustain Arthur's argument, a DNA test must have been done on the evidence with the results subsequently withheld from the Governor. However, no testing has been done on the evidence to this court's knowledge. Moreover, the Governor, in his discretion in the clemency process, has the executive authority to order DNA testing on the evidence if he deems it pertinent to his decision.

Arthur's clemency argument demonstrates no likelihood of success on the merits of the case.

5. Previous Consideration by Other Courts

In his 2001 habeas petition, Arthur filed a motion for discovery in which he asked for the identical evidence that he seeks in the instant action. Judge Edwin Nelson analyzed Arthur's theory for asking for the discovery, the facts underlying the evidence he sought to test, and the speculation of Arthur that the test results "might support this alternate version of events." *Arthur v. Haley*, Mem. of Op., Dec. 4, 2002, No.CV01-N-0983-S, at 6 (N.D. Ala. Dec. 4,

2002) (Nelson, J). Judge Nelson found that Arthur's claim of actual innocence would not be viable, even if the tests supported Arthur's version of the events surrounding the murder, when viewed under either the "more likely than not" standard or the "clear and convincing" standard. *Id.* Judge Nelson also wrote: "*Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002) further indicates that Arthur's request for release of the physical evidence is due to be denied *because he failed to exercise 'due diligence' in pursuing the facts during the state proceedings.*" *Id.* at 7 n.7 (emphasis added). Subsequently, Judge Scott Coogler took up the matter on Arthur's motion to alter or amend Judge Nelson's judgment. Having further analyzed Arthur's claims with respect to each particular piece of evidence sought to be tested by Arthur, Judge Coogler found:

> The physical evidence Arthur seeks to test includes Judy Wicker's bloody clothing, a rape kit created the day of the murder, a wig and hair samples from the Wicker residence, the bullet removed from the victim's body, spent cartridge casings found at the murder scene, and a pillowcase found beneath the victim's head. None of this evidence is new or was unknown to Arthur during the state court proceedings. *Arthur belatedly claims he diligently sought to test this evidence during state court proceedings*, and points to a motion made by counsel at his third trial . . . . A similar one-time request was found to be *insufficient evidence of diligence* in *Williams v. Taylor*, 529 U.S. at 439-40.

Arthur v. Haley, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003) (citation and internal quotation marks omitted) (emphasis added).

On appeal, the findings of the district court were upheld. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006). Addressing Arthur's entitlement to a hearing and discovery, the Eleventh Circuit held that generally "[a] habeas petitioner is not entitled to discovery as a matter of ordinary course, but [only] . . . upon a showing of good cause to believe that the evidence sought would raise sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *Arthur*, 459 F.3d at 1310 (internal quotation marks and citations omitted.) Further, "good cause for discovery cannot arise from mere speculation" or on "the basis of pure hypothesis. . . ." *Id.* Rejecting the "wounded" affidavits Arthur now again relies upon, the Circuit Court found that Arthur failed to furnish "good cause to believe that the facts, if fully developed through discovery sought [DNA and other testing], would be any different from those found at trial." *Id.*

Thus, two district judges and the Eleventh Circuit (a mere twelve months ago) have already determined as fact that Arthur was not diligent in pursuing the testing of this evidence *before 2002*, and that even if he were to be given the evidence for DNA and other testing, the outcome of his trial would be intact. Arthur has presented no new evidence or other credible reason why this court should ignore the findings of another district court and the very court which will in all likelihood review this opinion.

B. Relative Harm to the Parties

It goes without saying that Arthur faces irreparable harm without a stay of execution. However, irreparable harm is not necessarily harm that is avoidable. In the parlance of equity, the harm may only be avoided by entry of a stay of execution if the considerations in Arthur's favor outweigh the considerations of the State of Alabama in seeing its judgments honored. As noted in *Grayson, Jones, Rutherford, and Nelson*, Arthur's is a heavy burden because of a strong equitable presumption against entry of a stay. Arthur fails to carry this burden for several reasons. First, Arthur has delayed filing this action until his execution is imminent a second time.[9] The first time was his execution date of April 26, 2001, stayed after he filed his habeas petition less than a week before his execution date. This weighs against Arthur when Troy's murder occurred over twenty-five years ago, and Arthur's *third conviction* happened over fifteen years ago. By his unreasonable delay, Arthur "leaves

---

[9] The Eleventh Circuit affirmed the denial of Arthur's habeas petition on June 21, 2006, *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006), and modified on August 14, 2006, *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006). Yet Arthur did not file this action until April 12, 2007, nearly ten months after the Eleventh Circuit decided the habeas outcome. Arthur "should have foreseen that the execution date would likely be set promptly upon completion of collateral review." *Jones*, 485 F.3d at 639 n.2. "Waiting to file suit until the Supreme Court has denied *certiorari* review of an inmate's federal habeas petition, or, as Jones did, waiting until a petition for *certiorari* has been pending for over three months, is simply too late to avoid the inevitable need for a stay of execution." *Id.* Like Jones, Arthur waited too long to file.

little doubt that the real purpose behind his claim is to seek a delay of his execution . . . ." *Jones*, 485 F.3d at 640 (quotation marks and citation omitted).

Another factor weighing against Arthur is the likelihood that a stay will result in another reprieve of several years while his request to conduct DNA and other testing is litigated. As noted above, the right to DNA testing is nowhere guaranteed except in extraordinary cases, *Grayson*, 460 F.3d 1339, and this is not one. Arthur has failed to raise other grounds of relief with a substantial likelihood of success. The conclusion is almost inescapable that the only outcome of a stay would be further delay, to the prejudice of the State.

The State would be prejudiced in other ways as well. The State's interest in meting out a sentence of death in a timely manner acquires "an added moral dimension" when post-trial proceedings have run their course. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1988). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (internal citation and quotation marks omitted). Even a cursory review of Eleventh Circuit precedent affirms this interest. *See, e.g., Jones*, 485 F.3d at 641 ("We will not interfere with the State's strong interest in enforcing its judgment in this case."); *Grayson*, 460 F.3d at 1342 ("[T]he government has a strong interest in the finality of duly adjudicated criminal judgments."); *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983) ("Each delay, for its span, is a commutation of a death sentence to one of imprisonment."). The court cannot ignore this firmly rooted sentiment.

The injunctive relief Arthur seeks in this lawsuit is merely temporal. He claims: "The relief requested is injunctive in nature. Arthur also disclaims any attempt to challenge his conviction and sentence of death with this lawsuit, and instead focuses solely on the search for and release of physical evidence as described below for DNA and other testing." (Compl. ¶ 10.)[10] The statement foretells yet another § 1983 action or habeas petition resting on the presumptive, but not asserted here, claim that the testing will produce evidence of actual innocence requiring future court activity in new cases. The prospect of still more litigation following the instant case, after so long a delay, is highly prejudicial to the interests of the State in the finality and enforcement of its judgments.

The State would be further prejudiced by rewarding a dilatory and late-filing plaintiff with a stay. This case does not exist in a vacuum. Arthur's success here would encourage other death row inmates to wait late in the litigation day to file similar actions. Costs to the State are increased by the requirements of last-minute filings, expedited discovery, motion and trial schedules, and expedited appeals. Arthur seeks to establish such a precedent, but "the government has a strong interest in the finality of duly adjudicated criminal judgments . . . . Compelling interests - *e.g.*, guarding against a flood of requests, protecting the finality of convictions, and

---

[10] Obviously, this statement in the complaint is offered to avoid the charge of a successive habeas action, but the remainder of the complaint is couched almost exclusively in terms of speculative actual innocence claims. *See Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002).

ensuring closure for victims and survivors - support the State's position in this case." *Grayson*, 460 F.3d at 1342 (citations omitted). The same interests are present here.

Weighing the relative harm to the parties, the weight of relevant considerations clearly favors the State and operates against the entry of a stay of execution.

C. Unreasonable Delay

Arthur was first convicted of Troy's murder in February 1982. With two successful appeals and resulting new trials in state court, Arthur was convicted a second time on May 13, 1987, and a third time on December 5, 1991.[11] After an execution date was set in 2001, Arthur filed his habeas petition on April 20, 2001, and received a stay of execution from the District Court of the Northern District of Alabama on April 25, 2001. *Arthur v. Haley*, 248 F.3d 1302, 1303 (11th Cir. 2001) (denying the motion to vacate the stay). Arthur has had fifteen years since his third conviction, six years after he filed his habeas petition, and more than four years since § 1983 was recognized in *Bradley*, 305 F.3d 1287, as the proper vehicle to obtain access to evidence for DNA testing. Moreover, DNA testing has been available since 1986, more than twenty years before Arthur sought testing in this action, a period which includes his last two capital trials. *See Grayson*, 460 F.3d 1328 at 1335. Arthur could have sought full access to test items for DNA, but he did not

---

[11] The convictions were reversed on grounds not relevant to the issues under consideration here.

diligently pursue the procedure either at his second or third trial.

There are other reasons to find Arthur's delay unreasonable. In Arthur's habeas petition, two district judges and the Eleventh Circuit found not only that the evidence Arthur now seeks to test is insufficient to sustain the gateway claim of actual innocence, but that Arthur was not diligent in pursuing access to the evidence *before 2002.* It strains the meaning of plain language to say that an identical request five years later in 2007, under the guise of § 1983 and under yet another shadow of execution, can somehow be honestly construed as timely.

Bradley was decided on September 23, 2002. Eleven months later, on August 18, 2003, counsel for Arthur wrote defendant King seeking access to the evidence sought in this suit for DNA testing. (Compl., Ex. Twenty Six.) Exhibits six through twenty-five to the complaint contain a series of letters dated in November and December, 2003, requesting the evidence at issue from various state and local officials on behalf of Arthur. Obviously, Arthur was unsuccessful in his requests. He offers no explanation why he delayed nearly five years after the ruling in *Bradley*, and over three years after his demand letters, to bring this complaint on April 12, 2007. The court finds that Arthur's delay in bringing his § 1983 complaint is unreasonable, a factor that also weighs against him in a stay of execution analysis.

IV. CONCLUSION

No aspect of the equitable analysis of the entry of a stay of execution for a death row inmate in a § 1983 action favors Arthur. He demonstrates no likelihood of success on the merits, the relative harm factors weigh against him, and his delay in bringing the action is found to be unreasonable under the precedent of this circuit. Accordingly, the court must apply the strong equitable presumption against a stay of execution. The equities now lie with the State of Alabama to enforce its criminal judgment. The appropriate remedy is dismissal of the action.

For the foregoing reasons, it is ORDERED that the defendants' Motion to Dismiss (Doc. #8) is GRANTED and that this case is dismissed. An appropriate judgment will be entered.

DONE this 17th day of August, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS D. ARTHUR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:07-cv-319-WKW
	)	
TROY KING, *et al.*,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Before the court is Thomas D. Arthur's Motion to Alter or Amend Judgment (Doc. # 18). For the reasons that follow, the court will DENY the motion.

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to amend or alter the judgment of a court. *See* Fed. R. Civ. P. 59(e). "The decision to alter or amend a judgment is committed to the sound discretion of the district court." *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006) (citations omitted). "There are four basic grounds for granting a Rule 59(e) motion: (1) manifest errors of law or facts upon which the judgment was based; (2) newly discovered or previously unavailable evidence; (3) manifest injustice in the judgment; and (4) an intervening change in the controlling law." *Jacobs v. Electronic Data Sys. Corp.*, 240 F.R.D. 595, 599 (M.D. Ala. 2007) (Thompson, J.) (citing 11 Charles Alan Wright,

Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2810.1, at 124-27 (2d ed. 1995))

On August 17, 2007, the court granted the defendants' motion to dismiss. On August 27, 2007, Arthur timely filed his Motion to Alter or Amend Judgment.[1] In his motion, Arthur argues that a new unsworn statement from Ray Melson is "powerful" evidence of his innocence, that *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006) is factually distinguishable from his case, and that the court erred in finding that he unreasonably delayed in seeking DNA testing of the evidence compiled by the authorities. The court is not persuaded by Arthur's arguments for the following reasons.

Melson's Testimony

Arthur alleges that a new unsworn statement from Melson (Mot. Ex. D) provides "powerful evidence of [his] innocence." (Mot. at 1.) In the course of Arthur's post-conviction litigation, Melson has provided two affidavits; one affidavit alleging that Melson saw Arthur on the day of the murder (Mot. Ex. A), and the second recanting the first (Mot. Ex. B). His third statement allegedly sheds light on his previous inconsistencies. In his first affidavit dated August 2, 2002, Melson testified that Arthur visited Copper Mobile Homes of Decatur, Melson's employer, between 8:00 a.m. and 9:00 a.m. on the day of Troy's murder. Melson testified that he and Alphonso High spoke to Arthur "for about 20 to

---

[1] Federal Rule of Civil Procedure 59(e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

30 minutes." (Mot. Ex. A ¶ 2.) On September 20, 2002, Melson recanted his first affidavit. Melson recalled that he was on medication during the time he signed the first affidavit, and he "did not really remember what was in the affidavit, or if [he] even read it the day that [he] signed it." (Mot. Ex. B at 1.) Melson testified that he "cannot say with any certainty" that he saw Arthur on the morning of Troy's murder. (*Id.* at 2.) Now, in an attempt to explain why he recanted his first affidavit with his second, Melson's unsworn statement, dated August 22, 2007, alleges that he was on pain medication the day that he signed the *second* affidavit and was unaware of its exact contents at the time. Moreover, he alleges that he did indeed see Arthur on the morning of Troy's murder. Melson now claims, for the first time, that the day was memorable because he delivered a double-wide trailer to Birmingham, which was "unusual," and that "the trailer got stuck in the mud while [he] was transporting it . . . ." (Mot. Ex. D ¶¶ 12-13.)

For a number of important reasons, the court cannot credit the latest iteration of Melson's "fundamentally wounded" recollection.[2] The statement is unsworn and under ordinary circumstances would not be considered at all. More importantly, the statement creates more questions than it answers, not about Arthur's involvement in Troy's murder, but about the credibility of Melson. The effects of Melson's prescription drug use and abuse (used as an excuse in both retractions), his not coming forward at the time of any of the three highly

---

[2] *Arthur v. Allen*, 459 F.3d 1310, 1311 (11th Cir. 2006).

publicized trials and subsequent death sentences, the addition of still more new facts,[3] and the ability to clearly remember an exact date and time over twenty-five years ago are but a few. The third statement actually diminishes the value of anything Melson may have to say to the point of no credibility at all. It is a repudiation of a repudiation. Under the circumstances, it adds zero to the DNA equation.

Even more telling, Melson's third statement comes one month shy of *five years since he repudiated his first affidavit.* The court cannot fathom, if this is in fact "powerful evidence of Mr. Arthur's innocence" (Mot. at 3.), why the statement did not surface one, two, three, or four years after the 2002 repudiation affidavit, or even as an exhibit filed with the complaint in April 2007. *See Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990) ("Motions, such as motions to amend, should not be used to raise arguments which could, and should, have been made before the judgment is issued." (citation and internal quotation marks omitted)).[4] The court can only conclude that this motion is a desperate last-minute effort in the shadow of an execution date to postpone or avoid that date.

Grayson

Arthur argues that the procedural safeguards afforded to Grayson were more adequate than those

---

[3] Melson claims that the delivery of the double-wide trailer to Birmingham was unusual, and that the trailer got stuck in the mud. (*See* Mot. Ex. D ¶¶ 12-13.))

[4] Arthur's briefing throughout this case has argued the first version of Melson's story with no hint that a third version was in the wings.

afforded to himself. The court disagrees. Mr. Grayson "received a fair trial, a direct appeal, and both state and federal habeas proceedings and appeals." *Grayson*, 460 F.3d at 1341. Similarly, the procedural safeguards afforded to Arthur included "three trials and three convictions that resulted in death sentences (two convictions were reversed in state court proceedings); state and federal habeas proceedings; and a stay of execution." (Doc. # 14 at 15.) Moreover, Arthur argues that, unlike *Grayson*, he never received a review on the merits of his claims because the district court dismissed his habeas proceedings as untimely. Arthur creatively attempts to relitigate an already settled habeas issue. For the court to accept Arthur's argument, it must find that he tolled the statute of limitations for his habeas action.

Judge Edwin Nelson concluded, in a detailed opinion, that Arthur did not file his habeas petition within the one year statute of limitations. *See Arthur v. Haley*, Mem. of Op., No. CV01-N-0983-S, at 6 (N.D. Ala. Dec. 4, 2002). Subsequently, Judge Scott Coogler denied Arthur's motion to amend or alter the judgment of Judge Nelson. *See Arthur v. Haley*, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003). The Eleventh Circuit upheld the decisions in *Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006), and the United States Supreme Court refused to grant certiorari. *Arthur v. Allen*, __ U.S. __, 127 S.Ct. 2033 (2007). Arthur failed to persuade two district court judges, the Eleventh Circuit, and the United States Supreme Court of the validity of his argument. The court refuses to entertain an analysis of Arthur's previously unsuccessful argument.

Moreover, the fact that Arthur has been afforded significant procedural safeguards for his liberty interest differs from considerations of whether he took advantage of them.

Unreasonable Delay

Arthur avers that the court should not consider unreasonable delay in its analysis of his claims for two reasons: he had ineffective assistance of counsel and could not take advantage of DNA testing at his second and third trials, and the diligence analysis applied in Judge Nelson and Coogler's habeas opinions is not good law. As to Arthur's first argument, his claims of ineffective assistance of trial counsel have been litigated. *See Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), *aff'd Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). Moreover, these claims were not before the court in his § 1983 complaint for DNA testing.

As to Arthur's second argument, unreasonable delay is a necessary equitable consideration in determining whether to grant a stay of execution. *See Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004). The court took notice of the dilatory actions of Arthur by referencing the *findings of fact* of Judges Nelson and Coogler, findings which were affirmed by the Eleventh Circuit. The question before this court was whether Arthur unreasonably delayed in seeking access to DNA testing, not whether he was diligent in securing an evidentiary hearing in his habeas action. The diligence analysis to which Arthur refers as "not good law" (Mot. at 7) is in reference to the latter point, not the former.

Having considered all Arthur's arguments and for the above reasons, it is ORDERED that Arthur's Motion to Alter or Amend Judgment (Doc. # 18) is DENIED.

DONE this 30th day of August, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13933

D.C. Docket No. 2:07-cv-319-WKW

THOMAS D. ARTHUR,

Plaintiff-Appellant,

versus

TROY KING,
Attorney General for the State of Alabama, in his official capacity,
BRYCE U. GRAHAM, JR.,
District Attorney for Colbert County, in his official capacity,
RONNIE MAY,
Sheriff for Colbert County, in his official capacity,
M. DAVID BARBER,
District Attorney for Jefferson County, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

---

(September 21, 2007)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Plaintiff Thomas D. Arthur is an Alabama death row inmate scheduled for execution by lethal injection on 27 September 2007. On 12 April 2007, Arthur filed a 42 U.S.C. § 1983 complaint in the United States District Court for the Middle District of Alabama seeking access to specific materials collected at the crime scene for DNA and other testing.

The United States Supreme Court denied Arthur's petition for writ of certiorari in his federal habeas action on 16 April 2007, and, on 17 April 2007, the State of Alabama ("Alabama") filed a motion with the Alabama Supreme Court to set an execution date. In this case, defendants Troy King, Bryce U. Graham, Jr., Ronnie May, and M. David Barber (collectively, "King") filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on 18 May 2007, arguing that Arthur's complaint failed to state a claim upon which relief could be granted.

On 22 June 2007, the Alabama Supreme Court granted Alabama's motion, and set the execution date for 27 September 2007. The district court subsequently granted King's motion to dismiss, Arthur v. King, No. 07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007) ("Arthur XX"), and denied Arthur's motion to alter or amend judgment, 2007 WL 2539962 (M.D. Ala. Aug. 30, 2007) ("Arthur XXI"). Arthur timely appealed and requested expedited briefing and a stay of execution

pending appeal. We granted expedited briefing and now affirm the district court's judgment dismissing Arthur's § 1983 action. We also deny his motion for a stay of execution pending appeal as moot.

I. BACKGROUND

The details of Arthur's offense are set forth in our opinion affirming the district court's judgment denying Arthur federal habeas relief. See Arthur v. Allen, 452 F.3d 1234 (11th Cir.) ("Arthur XV"), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006) ("Arthur XVI"), cert. denied, ___ U.S. __ 127 S. Ct. 2033 (2007) ("Arthur XVII"). Briefly, in 1982, Arthur, while serving a sentence for murder in the second degree and assigned to a work release center, murdered Troy Wicker, the husband of one of Arthur's paramours, Judy Wicker, by shooting Wicker through the right eye, while he was asleep, with a .22 caliber pistol.

Arthur was indicted for murder, convicted, and sentenced to death by electrocution in 1982. His conviction and sentence were affirmed by the Alabama Court of Appeals, Arthur v. State, 472 So. 2d 650 (Ala. Crim. App. 1984) ("Arthur I"), but reversed by the Alabama Supreme Court because the trial court had improperly permitted evidence of Arthur's prior murder conviction. Ex parte Arthur, 472 So. 2d 665, 668-70 (Ala. 1985) ("Arthur II"). The case was remanded for a new trial. Arthur v. State, 472 So. 2d 670 (Ala. Crim. App. 1985) ("Arthur III"). In 1987, Arthur was again convicted and sentenced to death. His conviction was reversed, however, because of the admission of Arthur's statement to the police after he had invoked his right to remain silent.

Arthur v. State, 575 So. 2d 1165, 1171-75 (Ala. Crim. App. 1990) ("Arthur IV"), cert. denied, In re Arthur, 575 So. 2d 1191 (Ala. 1991) (per curiam) ("Arthur V"). In 1991, Arthur was indicted and convicted of murder for pecuniary gain. Arthur was sentenced to death in 1992. His conviction and sentence were affirmed. Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996) ("Arthur VI"), affirmed, In re Arthur, 7 .1 So. 2d 1097 (Ala. 1997) ("Arthur VII"). He did not file a petition for writ of certiorari to the United States Supreme Court.

Approximately twenty–nine months later, in September 2000, Alabama filed a motion with the Alabama Supreme Court to set an execution date. In January 2001, Arthur filed a petition for postconviction relief with the state trial court. The petition, however, was dismissed as untimely because of a mandatory two–year limitations period required by Alabama Rule of Criminal Procedure 32.2(c), and that decision was affirmed. Arthur v. State, 820 So. 2d 886, 888-90 (Ala. Crim. App. 2001) (per curiam) ("Arthur VIII"), cert. denied, Arthur v. Alabama, 535 U.S. 1053, 122 S. Ct. 1909 (2002) ("Arthur IX"), The Alabama Supreme Court set execution date, Ex parte Arthur, 821 So. 2d 251 (Ala. 2001) ("Arthur X") for 27 April 2001.

On 20 April 2001, Arthur filed a federal petition for writ of habeas corpus. The district court granted a stay of execution. We denied a motion to vacate the stay, Arthur v. Haley, 248 F.3d 1302, 1303 (11th Cir. 2001) (per curiam) ("Arthur XI"), and the Supreme Court denied an application to vacate the stay of execution of sentence of death. Haley v. Arthur, 532 U.S. 1004, 121 S. Ct. 1676 (2001) ("Arthur XII"). The federal district court dismissed Arthur's habeas

petition, Arthur v. Haley, No. CV-01-N-0983-S (N.D. Ala. Dec. 4, 2002) ("Arthur XIII") and his motion to alter or amend the judgment, Arthur v. Haley, No. CV-01-N-0983-S (N.D. Ala. Jun 5, 2003) ("Arthur XIV"), but granted a certificate of appealability. We affirmed the district court's denial of habeas relief in 2006, Arthur XV, and the Supreme Court denied his petition for writ of certiorari on 16 April 2007, Arthur XVII. The Alabama Supreme Court subsequently set the date of execution.[1]

II. DISCUSSION

During the district court's consideration of Arthur's 2001 federal petition for writ of habeas corpus, Arthur moved for leave to conduct discovery related to his claim of actual innocence. Arthur XIII at 5; Arthur XIX at 2. He sought the clothing that Wicker was wearing on the day of the murder, the rape kit created that same day, the hair samples and wig recovered from Judy Wicker's car, the hair sample and vacuum sweepings recovered from the Wickers' residence, spent cartridge casings and a pillowcase found near Troy Wicker's body, the bullet recovered from Troy Wicker, and photographs of the crime scene. Arthur XIII at 5; Arthur XIV at 3; Arthur XV at 1247 n.9. The district court denied the request, finding that it would, at best, impeach Judy

---

[1] In May 2007, Arthur also filed an action under § 1983 in the Southern District of Alabama, challenging Alabama's method of execution. The district court, however, granted Alabama's motion to dismiss based on laches, Arthur v. Allen, No. 07-0342, 2007 WL 2320069 (S .D. Ala. Aug. 10, 2007) ("Arthur XVIII"), and we affirmed, No. 07-13929(11th Cir. Sep. 17, 2007) (Arthur XIX").

Wicker's testimony but would not establish Arthur's actual innocence claim. Arthur XIII at 7; Arthur XIV at 5-7. We affirmed, noting that Arthur failed to satisfy the diligence requirement of 28 U.S.C. § 2254, failed to pursue the testing of the requested evidence during his three trials or during state court postconviction proceedings, and failed to demonstrate good cause for his failure to seek the evidence. Arthur XV at 1248. We also noted that "good cause for discovery cannot arise from mere speculation" and that the Arthur's claim that the discovery might prove that he was not the perpetrator was "not enough." Arthur XVI at 1311.

Arthur's § 1983 action sought access to the biological and other evidence used at his trial, and alleged that King's refusal to provide him with the evidence violated his Fourteenth Amendment right to due process, his Eighth Amendment right not to be subjected to cruel and unusual punishment, his right of access to the courts, and his clemency rights. The district court dismissed the § 1983 challenge, finding that Arthur's request could not be litigated without the entry of a stay of execution and that Arthur had failed "to overcome the strong equitable presumption against the grant of a stay." Arthur XIX, slip op. at 9, 2007 WL, 2381992 at *4. It concluded that Arthur had failed to demonstrate a likelihood of success on the merits, that prejudice to Alabama outweighed prejudice to Arthur, and that Arthur unreasonably delayed filing his § 1983 action. Id. at 21-25, 2007 WL 2381992 at *11-12.

On appeal, Arthur argues that the district court erred in dismissing his complaint and in refusing to alter or amend its judgment. He maintains that the district court erred in concluding that he was

provided procedural safeguards regarding a fair trial because his postconviction proceedings were dismissed as untimely and he has thus not received a review on the merits. He contends that it was error to apply a "strong equitable presumption against the grant of a stay" when no stay was sought and there was no showing that a stay was needed for his claims to be litigated. He maintains that the district court erred by concluding that he had failed to demonstrate a likelihood of success on the merits because DNA testing could identify the actual perpetrator. He argues that the district court failed to recognize, in its relative harm analysis, that Arthur seeks exculpation, and erred in concluding that he unreasonably delayed in filing his action. He also asserts that the district court erred in not crediting the newly discovered exculpatory evidence without holding an evidentiary hearing.

We review a district court's dismissal under Rule 12(b)(6) for failure to state a claim de novo, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff Grayson v. King, 460 F.3d 1328, 1336 n. 5 (11th Cir. 2006) ("Grayson I"); Swann v. S. Health Partners, Inc., 388 F.3d 834, 836 (11th Cir. 2004). We will affirm only if the Rule 12(b)(6) motion establishes, beyond doubt, that there is no set of facts to support the plaintiff's claim which would entitle the plaintiff to relief. Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1187 (11th Cir. 2004).

Although a district court's decision to grant or deny equitable relief is reviewed for abuse of discretion, Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1220 (11th Cir. 2002); United States SEC v. Ginsburg, 362 F.3d 1292, 1297 (11th Cir.

2004), we review the underlying decisions regarding questions of law de novo and findings of fact for clear error. Preferred Sites, LLC, 296 F.3d at 1220. "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996).

A plaintiff may seek postconviction access to biological evidence for DNA testing as a § 1983 action, but must show that denial of such access "deprive[s] him of a federally protected right" in order to state a claim. Grayson I at 1336. In Grayson I, we held that "Grayson ha[d] no asserted constitutional right to [biological evidence for DNA testing] under the factual circumstances of the case," but left open the possibility that another § 1983 plaintiff might prevail. Id. at 1342–43.[2]

"[T]he equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 . . . challenges are equally applicable to requests for both stays and injunctive relief" and are "not available as a matter of right." Williams v. Allen, ___ F.3d ___, 2007 WL 2368028 at *2 (11th Cir Aug. 21, 2007) (quoting Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007) ("Grayson II"), cert. denied, __ U.S. __, S. Ct. __ 2007 WL 2086662,

---

[2] The facts in Grayson I established that (1) DNA testing was available as early as 1986, but that the test which Grayson wished to perform was not widely used until the mid-1990s; (2) the evidence sought was introduced at trial, and there was no claim that the evidence was suppressed by the prosecution or that Grayson was denied a fair trial; and (3) the DNA testing sought, even if exculpatory, could not show that he was actually innocent but only that another person was involved in the crime. Id. at 1335-36, 1337, 1339.

76 USLW 3049 (Jul. 26, 2007)). Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiffs satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits. Hill v. McDonough, ___ U.S. ___, ___, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (2004). The strong interest of the State and the victims' families is in "the timely enforcement of a sentence", id. at __, 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. Calderon v. Thompson, 523 U.S. 538, 556, 118 S. Ct. 1489, 1501 (1998).

A. Dismissal of Arthur's § 1983 Action for unjustifiable delay

Arthur contends that the district court erred by finding that he could not establish a reasonable likelihood of success on the merits and by applying a strong equitable presumption against the grant of a stay, because no stay was sought and there was no showing that a stay was needed for Arthur's claims to be litigated. He maintains that a denial based on the necessity for a stay was inappropriate because his action was filed before the Supreme Court denied

his petition for writ of certiorari regarding his federal habeas petition and before Alabama moved the Alabama Supreme Court to set his execution date. He contends that, at the time when he filed his complaint, his execution date was not imminent, and that it is unreasonable to set such a standard at a time after his complaint was filed.

In his § 1983 complaint, Arthur sought access to (1) Judy Wicker's clothing, (2) Judy Wicker's rape kit, (3) a wig and hair samples collected from Judy Wicker's car, (4) vacuum sweepings from the Wickers' den, (5) hair samples taken from a shoe, (6) spent cartridges, a bullet, and a pillow case taken from the Wickers' home, and (7) crime scene photographs that were admitted at trial.[3] He maintained that DNA testing "could" show that someone else had assaulted Judy Wicker and murdered her husband, that Judy Wicker's testimony regarding him wearing a wig was a lie, and that someone other than Arthur was at the Wicker residence on the morning of the murder. R-I at 10.[4]

---

[3] Arthur presents no argument regarding the shell casings, pillowcase, bullet taken from the crime scene or the crime scene photographs on appeal. We, therefore, treat these issues as abandoned. United States v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001) (per curiam).

[4] Each of these claims was also presented in his 2001 habeas petition and his 2002 motion for leave to conduct discovery and considered by the district court. As to Judy Wicker's clothing, the district court concluded that there was no basis in the record for Arthur's belief that the blood on her clothing belonged to her assailant, Arthur XIII at 7 n.6, or to anyone other than Judy Wicker, Arthur XIV at 5. As to the rape kit, the vacuum sweepings, and the hair samples taken from the residence, the district court concluded that merely showing that

Relying upon the analysis set forth in Rutherford v. Crosby, 438 F.3d 1087, 1092 (11th Cir.), vacated on other grounds, Rutherford v. McDonough, U.S, 126 S. Ct 2915 (2006) ("Rutherford I"), Hill v. McDonough, __ U.S.__, __, 126 S. Ct. 2096, 2104 (2006) and Grayson II, the district court found that Arthur had unreasonably delayed in filing his § 1983 action and that, absent a stay of execution to which he was not entitled, his requests could not be litigated. Arthur XX, slip op. at __, 2007 WL 2381992 at *4, 13.

In considering the dismissal of a § 1983 challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff "delayed unnecessarily in bringing the claim, . . . knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not

---

another person was with Judy Wicker or in her home at some unspecified time does little to support her testimony or to further impeach her testimony about Arthur's involvement and, at best, would provide further information about Judy Wicker's veracity which was amply covered during the state trial, and that Arthur did not offer any reason to believe that testing the rape kit would help show that he was more likely than not actually innocent. Arthur XIII at 7 and n.6; Arthur XIV at 3, 5-7. As to the wig and hair samples, the district court found that expert testimony at trial indicated that the hair samples were of African American origin, and that Arthur provided no support for his speculation that different tests could impeach Judy Wicker's testimony. Arthur XIII at 7 and n.6. In denying his motion to alter or amend the judgment, the district court concluded that, although no explanation had been offered for the hair found in the car or for the lack of the hair in the wig, the findings were not inconsistent with Judy Wicker's testimony and Arthur offered no reason to believe that an examination would reveal anything other than what was already established. Arthur XIV at 5-6.

possibly be accomplished" within the short period of time between filing and the scheduled execution date. Rutherford v. McDonough, 466 F.3d 970, 974 (11th Cir. 2006) ("Rutherford II") (also citing and quoting Hill, __ U.S. at __, 126 S. Ct. at 2104) ("The federal courts can and should protect States from dilatory . . . suits" or "suits . . . filed too late in the day."); see also Grayson II at 1321 ("[C]ourts considering dismissal of a dilatory § 1983 suit seeking injunctive relief should recognize the 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay" (quoting Rutherford, 466 F.3d at 974 (quoting Hill, __ U.S. at __, 126 S. Ct. at 2104))); Williams, __ F.3d at ___, 2007 WL 2368028 at *4 ("[T]he district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief.").

As the district court concluded, Arthur is unable to defeat King's motion to dismiss. Arthur's case would clearly take additional time to fully litigate this claim. See Grayson II at 1326 n.4 (noting that Grayson's § 1983 action seeking access to physical evidence "took over four years to proceed from the district court through the Supreme Court's denial of certiorari review."). Arthur has not argued that the evidence was suppressed by the prosecution during his trial or that his trial was unfair as a result of the suppression of evidence, and there was ample evidence linking Arthur to Troy Wicker's murder. He is also unable to establish that the DNA testing would exonerate him of murder. The numerous courts which have reviewed his claims have provided

him with procedural safeguards to protect his liberty interest. This action, seeking DNA testing of evidence, was filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition. Further, a plaintiff has been able to see evidence through a § 1983 action for at least five years.[5] Arthur is thus unable to show that he is entitled to the postconviction access to evidence under Grayson I.

Arthur is also not entitled to a stay. The evidence which he seeks is the same evidence that was considered by the district court during his habeas corpus petition and which will not clearly exonerate him. He is unable to show a likelihood of success on the merits and the balance of the equities weigh against the grant of a stay. Arthur sought neither a motion to expedite the proceedings nor a motion to stay his execution in the district court. The motions which he has filed with us, to expedite the briefing schedule and to stay his execution, are admissions that expedited consideration and a stay are

---

[5] In 2002, we held that a prisoner could seek an order compelling the prosecution to produce evidence for DNA testing through an action filed pursuant to § 1983. Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002), cert. denied, 538 U.S 999, 123 S. Ct. 1909 (2003). We also note that, during oral argument on Arthur's federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim.

necessary. With a 27 September 2007 execution date, the § 1983 action could not be fully litigated on the merits absent a stay of execution. Although "the equitable considerations in each case are naturally different," even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay operates against him. See Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir.), cert. denied, __ U.S. __, 127 S. Ct. 2160 (2007).

B. Denial of Arthur's motion to alter or amend the judgment

After the district court had dismissed his complaint and Arthur had appealed that dismissal, Arthur timely filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) in the district court. In this motion, he argued, inter alia, that a new affidavit from Ray Melson provided evidence of Arthur's innocence. In support of this motion, he submitted three affidavits from Melson and an affidavit from Stephen Gustat. The affidavits from Melson provide Arthur with an alibi, recant that alibi, and repudiate the recantation.

The district court discredited Melson's third affidavit because it was unsworn, created more questions than it answered regarding Melson's credibility, "actually diminishe[d] the value of anything Melson may have [had] to say to the point

of no credibility at all," and was filed only as "a last-minute effort" because it was not filed earlier.[6]

---

[6] The district court explained,

> [d]uring the course of Arthur's postconviction litigation, Melson . . . provided two affidavits; one affidavit alleging that Melson saw Arthur on the day of the murder, and a second recanting the first. His third statement allegedly sheds light on his previous inconsistencies. In his first affidavit dated August 2, 2002, Melson testified that Arthur visited Copper Mobile Homes of Decatur, Melson's employer, between 8:00 a.m. and 9:00 a.m. on the day of Troy's murder. Melson testified that he and Alphonso High spoke to Arthur "for about 20 to 30 minutes." On September 20, 2002, Melson recanted his first affidavit. Melson recalled that he was on medication during the time he signed the first affidavit, and he "did not really remember what was in the affidavit, or if [he] even read it the day that [he] singed it." Melson testified that he "cannot say with any certainty" that he saw Arthur on the morning of Troy's murder. Now, in an attempt to explain why he recanted his first affidavit with his second, Melson's unsworn statement, dated August 22, 2007, alleges that he was on pain medication the day that he signed the *second* affidavit and was unaware of its exact contents at the time. Moreover, he alleges that he did indeed see Arthur on the morning of Troy's murder. Melson now claims, for the first time, that the day was memorable because he delivered a double-wide trailer to Birmingham, which was "unusual," and that "the trailer got stuck in the mud while [he] was transporting it. . . ." Arthur XXI, slip op. at ___, 2007 WL 2539962 at *1.

The district court noted a "number of important reasons" for not crediting Melson's third affidavit: (1) "it is unsworn," and (2) "creates more questions than it answers about the credibility of Melson," including (a) "[t]he effects of Melson's prescription drug use and abuse (used as an excuse in both retractions)", (b) his not coming forward during any of the Arthur's "three highly publicized trial and subsequent death sentences," (c) "the

Arthur XXI, slip op. at __, 2007 WL 2539962 at *2. It concluded that Arthur's argument that he was not afforded significant procedural safeguards was considered on habeas, that he failed to raise his ineffective assistance of counsel claim in his initial § 1983 complaint, and that the court had properly considered Arthur's delay in dismissing his complaint. Id. at __, 2007 WL 2539962 at *2-3.

We review the denial of a Rule 59 motion for abuse of discretion. Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006). "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005).

Arthur cannot show that the district court abused its discretion in denying his motion to alter or amend the judgment. Because Melson's affidavit was

---

addition of still more new facts," such as the delivery of the double-wide trailer and that it got stuck, and (d) Melson's "ability to clearly remember an exact date and time over twenty-five years ago." Id. at __, 2007 WL 2539962 at *2.

Attached to King's brief is a fourth affidavit of Melson (which was not provided to the district court). King Br. at Exh. A. In this sworn affidavit dated 5 September 2007, Melson states that, although he "remember[s] seeing . . . Arthur on one morning around the time of the . . . Wicker murder," he "do[es] not . . . remember what day of the week it was, exactly what time of day it was," or whether he was "100% sure that [he] saw . . . Arthur on the day of the murder" and explained that "[i]t is simply hard to remember everything that happened in 1982. Id.

unsworn, it was not properly considered by the district court. See Holloman v. Jacksonville Housing Auth., No. 06-10108, slip op. at ___, 2007 WL 245555 at *2 (per curiam) ("unsworn statements, even from pro se parties, should not be consider[ed] in determining the propriety of summary judgment") (quoting Gordon v. Watson, 622 F.2d 120, 123 (5th Cir. 1980) (per curiam)). To the extent that it was considered, however, it was not newly discovered. It could have been discovered during the five years after Melson had repudiated his first affidavit, and filed with the complaint. As the district court held, by repudiating a repudiation of his initial affidavit, Melson's third affidavit raised more questions, at least regarding his credibility, than it answered.

III. CONCLUSION

We conclude that the district court did not abuse its discretion in dismissing Arthur's § 1983 action, especially given the strong presumption against the grant of equitable relief. There was no justification for Arthur's failure to bring his request for physical evidence for DNA testing earlier to allow sufficient time, for full adjudication on the merits of this claim. The district court also did not abuse its discretion in denying Arthur's motion to alter or amend the judgment based on newly discovered evidence. Accordingly, the district court judgment of dismissal is AFFIRMED. Arthur's motion for a stay of execution pending appeal is DENIED as moot.

BARKETT, Circuit Judge, concurring in result:

I agree that Arthur is not legally entitled to relief on this claim.

70

(3)

FILED
SEP 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-397
(Application No. 07A261)
CAPITAL CASE

In the **SUPREME COURT OF THE UNITED STATES**

THOMAS D. ARTHUR
Petitioner,

v.

TROY KING, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION AND IN OPPOSITION TO A STAY OF EXECUTION

TROY KING
Attorney General of Alabama

J. CLAYTON CRENSHAW*
Assistant Attorney General
*Counsel of Record**

JASPER B. ROBERTS, JR.
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300, 242-7423*

EXECUTION SCHEDULED FOR SEPTEMBER 27, 2007

QUESTION PRESENTED

Should this Court grant Thomas Arthur's petition for writ of certiorari and motion for a stay of execution to review the issues he presents even though he could have brought this action at such a time that a full merits determination could have been made without the entry of a stay, yet, chose not to do so?

PARTIES TO THE PROCEEDING

The Parties to this action are as follows:

1) Thomas D. Arthur, Petitioner;

2) Troy King, Attorney General for the State of Alabama, in his official capacity, Respondent;

3) Bryce U. Graham, Jr., District Attorney for Colbert County, in his official capacity, Respondent;

4) Ronnie May, Sheriff for Colbert County, in his official capacity, Respondent; and

5) M. David Barber, District Attorney for Jefferson County, in his official capacity, Respondent.

TABLES OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Chronology of Relevant Events 2

B. Facts of the Crime 3

C. Arthur's § 1983 (DNA) Action 8

REASONS FOR DENYING THE WRIT 10

I. This Court Should Decline To Review The Issues Presented By Arthur Because His Petition Is (At Most) A Request For Fact-Bound Error-Correction 10

II. This Court Should Decline To Review The Issues Presented By Arthur Because He Has Not Established A Traditional Rule 10 Ground For This Court To Exercise Its Discretionary Review 11

A. Arthur's Contention That The Ninth Circuit Conflicts With The Eleventh Circuit Is Misleading And Erroneous 13

B. This Court Should Not Grant Certiorari Because The Sixth Circuit Has Time-Barred a Lethal-Injection Challenge Based On The Statute of Limitations 14

III. The Court Should Deny Arthur's Petition For Certiorari And His Motion For A Stay Of Execution Because The Eleventh Circuit's Decision Was Correct 16

A. The Eleventh Circuit Correctly Determined That Arthur Unreasonably Delayed In Filing This Action 17

B. The Courts Below Correctly Determined That Arthur Is Not Entitled To A Stay Of Execution Because The Balance Of The Equities Weigh Against Him 21

C. The Courts Below Correctly Determined That Arthur Could Not Establish A Likelihood Of Success On The Merits; Therefore, He Was, And Is, Not Entitled To A Stay Of Execution 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur v. Allen, __ U.S. __, 127 S. Ct. 2033 (Apr. 16, 2007) 2

Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007) ..... passim

Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007) ..... passim

Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996) 2

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005) 13, 14

Bradley v. Pryor, 305 F.3d 1287 (11th Cir. 2002) 19, 20

Brady v. Maryland, 373 U.S. 83 (1963) 29

Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489 (1998) 22

Cooey v. Strickland, __ F.3d __, 2007 WL 1574663 (6th Cir. June 1, 2007) 15

Cooey v. Strickland, 479 F.3d 412 (6th Cir. March 2, 2007) 15

Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997) 2

Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653 (1992) 13, 17

Grayson v. Allen, 491 F.3d 1318 (11th Cir. 2007) 18

Grayson v. King, 460 F.3d 1328 (11th Cir. 2006) 18, 20, 22

Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001) 9

Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853 (1993) 29

Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096 (2006) ..... passim

Jones v. Allen, 485 F.3d 635 (11th Cir. 2007) 14, 22

Mathews v. Eldridge, 424 U.S. 319 (1976) 29

Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004) 12, 15, 17

Schlup v. Delo, 513 U.S. 298 (1995) 29

Thompson v. Wainwright, 714 F.2d 1495 (11th Cir.1983) 22

United States v. Bagley, 473 U.S. 667 (1985) 29

Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007) 15

Statutes

Code of Alabama
Section 13A-5-40(a)(13)(2006 Replacement Vol) 2

United States Code
42 U.S.C. § 1983 1

Other Authorities

R. Stern, E. Gressman, et al., Supreme Court Practice § 4.14 (8th ed. 2002) 11

Rules

Supreme Court Rules
Rule 10 ..... 11, 12, 16

STATEMENT OF JURISDICTION

The petitioner's statement of jurisdiction is correct. Pet. at 2.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Petitioner's statement of the constitutional provisions and statutes involved is correct. Pet. at 2.

STATEMENT OF THE CASE

Arthur is traveling what has now become a well-traveled route: filing a civil action pursuant to 42 U.S.C. § 1983 at the conclusion of federal habeas proceedings. In fact, because Arthur knew that the State would move for an execution date, he filed two separate § 1983 actions, one in the district court for the Middle District of Alabama (DNA) and the other in the district court for the Southern District of Alabama (Lethal Injection). Presumably, Arthur chose to file the two belated actions in two different courts to increase his odds of obtaining a stay of execution and forcing the defendants into lengthy litigation, thus, staving off his execution for at least a few more years.

The district court, however, dismissed Arthur's complaint because: (1) he unreasonably delayed in filing his § 1983 action; (2) due to that delay the merits could not be litigated without the entry of a stay of execution; and 3) Arthur is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007); (Doc. #14 at 8-26). The Court of Appeals for the Eleventh Circuit agrees with the district court's findings

and affirmed the dismissal. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007) (per curiam).[1] Arthur now seeks this Court's review of the lower courts' fact-bound determinations.

A. Chronology of Relevant Events

Arthur was originally convicted in 1982 for the capital offense of murdering Troy Wicker after having been convicted of a previous murder within the last 20 years. See Ala. Code § 13A-5-40(a)(13)(2006 Replacement Volume). Arthur has been on Alabama's Death Row for approximately 16 years after being convicted for capital murder and sentenced to death in 1992 (for the third time). Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Arthur exhausted his state and federal appeals when this Court denied certiorari review on April 16, 2007. Arthur v. Allen, __ U.S. __, 127 S. Ct. 2033 (Apr. 16, 2007).

Realizing that denial of certiorari meant that the State would soon move to carry out his sentence of death, Arthur filed a § 1983 action seeking physical evidence collected in connection to his crime. See Doc. 1 (complaint filed on April 12, 2007). Although representatives of Arthur began requesting access to this evidence as far back as November of 2003, Arthur waited three and a half years to file this action. In addition, on August 12, 2004, during oral argument before the Eleventh Circuit regarding his federal habeas action, Judge Barkett informed Arthur's current attorney Suhana Han that he could seek access to physical evidence in a § 1983 action, yet he still chose to wait an additional two years and eight months to file this action. Arthur, 2007 WL 2744884, at *n. 5 ("[D]uring oral argument on Arthur's

---

[1] The 11th Circuit's opinion, it does not contain page numbers.

federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim."). Arthur's complaint does not contain any statement regarding why he waited to file his § 1983 lawsuit until his federal habeas challenge had almost concluded and he knew that the State would seek an execution date.

As Arthur must have suspected, shortly after this Court denied his petition for certiorari, the State moved the Alabama Supreme Court to set his execution date. On June 22, 2007, the Alabama Supreme Court granted the State motion and set Arthur's execution for September 27, 2007. (Doc. #14 at 7); Arthur, 2007 WL 2381992, at *4.

B. Facts of the Crime

The evidence at Arthur's third trial established that Troy Wicker was murdered on February 1, 1982, while he lay in bed at his home in Muscle Shoals. The prosecution presented the testimony of Judy Wicker. Judy Wicker testified that she began a sexual relationship with Arthur after he committed to killing her husband and that she paid him $10,000 to carry out the murder. (R. 753-54)

Talmadge Sterling, the custodian of records at the Decatur Work Release Center, where Arthur resided, testified that on February 1, 1982, Arthur had signed out for work at 6:00 a.m., and that at 7:10 in the evening Arthur had called for a ride back to the center, and that Arthur returned to the center at 7:50 p.m. (R. 502) As a part of his work release program, Arthur was assigned to work for Joel Reagan at Reagan Mobile Homes. (R. 454-57) Reagan, an old acquaintance of Arthur's, (R. 452), admitted that he did not keep track of Arthur's daily whereabouts, (R. 459), and "did not know Arthur's whereabouts on the day of the murder." (Doc. #8-1)

Patricia Green testified that Arthur frequented a local bar called Cher's Lounge "four or five times a week," sometimes in the company of Joel Reagan, where she worked part-time as a bartender. (R. 558) Debra Phillips, the operator of Cher's Lounge, likewise testified that Arthur came to the bar four to five times a week. (R. 617-619) Phillips and Arthur had a romantic relationship and even discussed the possibility of marriage. (R. 622-24) Pat Halliday, a shift supervisor at the Decatur Work Release Center in 1982, "testified there was a discrepancy between the number of hours Arthur was away from the center and the number of hours he was actually paid for working in February and March of 1982." (R1-61 at 11; R. 536-38)

On the afternoon before the day of the murder, Arthur, while at Cher's Lounge, took Patricia Green into the kitchen to speak with her out of hearing range of other bar patrons. (R. 560-62) At Arthur's request, Green sent a friend across the street to purchase .22 caliber mini magnum long rifle bullets. Id. After Green's friend purchased the bullets and brought them back to her, Green gave them to Arthur. Id. Brent Wheeler, an expert in firearm identification, testified that the bullet removed from the victim's body was a .22 caliber long rifle consistent with a CCI brand bullet. (R. 404-05) The four shell casings found near the body were CCI brand .22 long or long rifle casings. Id.

As the federal district court that addressed Arthur's habeas petition correctly stated, the above evidence tended to show that "Arthur had the opportunity and means to kill Troy Wicker." (R1-11 at 11) Furthermore, other evidence corroborated Judy Wicker's testimony. Joel Reagan saw Judy Wicker and Arthur together at the mobile home business. (R. 467) Judy Wicker stated that, on the morning of the murder, she took her sons to school,

drove back and forth on Avalon Avenue a couple of times and then picked Arthur up at the airport. (R. 754-59) This testimony was consistent with the testimony of Sergeant Eddie Lang, a Muscle Shoals police officer who was serving as a school crossing guard on Avalon Avenue that morning. Lang observed Judy Wicker twice pass by the crossing before 8:00 a.m., when he left his post. (R. 306-07)

Judy also testified that Arthur wore an Afro wig and makeup to disguise himself as a black man. Joseph Wallace, an evidence technician with the Alabama Department of Forensic Sciences, removed an Afro wig from the car that Arthur used to make his getaway. (R. 374) Judy testified that Arthur shot Troy Wicker one time and ransacked the house. (R. 768-70) Mr. Wallace, the evidence technician, testified that he found the Wicker home in disarray. (R. 365-67) Dr. Josefino Aguilar, a forensic pathologist, testified that the autopsy performed revealed that the victim had been shot one time. (R. 697-99) Judy testified that on the day of the murder Arthur was carrying a gun and a garbage bag. (R. 760) Debra Phillips testified that Arthur was supposed to meet her for lunch on the day of the murder, but he was late and, instead of going to lunch, they rode to a bridge over the Tennessee River where Arthur stopped the car and threw a garbage bag, that was half-full and bulky and wrapped in a sheet, into the river. (R. 627-34) As he disposed of the garbage bag, Arthur said he was "trying to get rid of some old memories." (R. 632)

Consistent with Judy Wicker's testimony that Arthur was paid $10,000 for murdering her husband, Arthur had a large amount of money in his possession after the murder. Pat Halliday, an employee with the Decatur Work Release Center, testified that Arthur was transferred to the Morgan County Jail after the discovery

of the discrepancy between the number of hours he was away from the center and the number of hours he was actually paid for working. Upon routine inspection of his effects before the transfer, twenty one hundred dollar bills were discovered in an envelope in Arthur's overcoat pocket. (R. 543)

Arthur was his own lead counsel at his trial, but was also represented by Harold Walden, and Walden's son served as stand-by counsel. Arthur conducted the majority of voir dire questioning, examination of witnesses, argument to the jury, and argument to the court. In fact, Arthur cross-examined virtually every one of the prosecution's 13 witnesses, often at length. See, e.g., (R. 375-85) Arthur presented four witnesses in his defense. Bruce Coan, a police detective, testified about his observations of the crime scene. (R. 867) Two of Arthur's four witnesses were called in an apparent attempt to offer an explanation of how, as a prisoner, he came to possess $2100. Bruce Carroll, a friend and fellow inmate, testified that he lost $6500 to Arthur in a poker game. (R. 879-83) Gene Moon, who resided in the Cullman County Jail at the time of his testimony, said that another inmate gave him an envelope with $2000 in it and that Moon put it in Arthur's coat. (R. 927-29) The fourth and final witness, Ronald Spears, an inmate at West Jefferson prison, stated that Patricia Green told him that the police were forcing her to lie about Arthur asking her to buy some bullets for him. (R. 901-07)

The record also reveals that Arthur was searching for witnesses to provide him with an alibi. During cross-examination of Joel Reagan, Arthur asked: "...[D]o you remember Larry Whitman telling you that he saw me the morning that Mr. Wicker was murdered over in Muscle Shoals?" (R. 473-74) There are no references in the trial record to either Alphonso High or Ray Melson, the two

individuals (of which more later) who signed affidavits filed in the federal district court stating they talked to Arthur around the same time Troy Wicker was being murdered, having seen Arthur on the day of the murder.

At the penalty phase, the lawyer who assisted Arthur, Harold Walden, argued that the jury should recommend a sentence of life without parole because of several mitigating factors. First, Walden argued that Arthur had been a model prisoner and had spoken to high school groups as a part of correctional programs to deter young people from committing crimes. (R. 1170) Walden also argued that Arthur's punishment was disproportionate in relation to the other persons that had involvement in Troy Wicker's murder. He told the jury that Judy Wicker, who was just as culpable as Arthur, was soon to be released from prison and that Rowland and McKinney had never been prosecuted for their roles. (R. 1171-72)

Arthur followed Walden and argued to the jury that he should be sentenced to death. Arthur said that Walden was morally opposed to the death penalty and urged the jury to disregard Walden's argument. (R. 1178) Arthur told the jury that he didn't have a death wish; in fact, he said "I wouldn't dare ask you for it if I thought for a minute that I would be executed." (R. 1181) Arthur argued that a death sentence would allow him to have more visitations from his children, (R. 1183), and to have more privacy in his death row cell as opposed to living in general population, (R. 1190), and would allow him to have more control over his appeals. (R. 1186-94) Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if the jury sentenced him to death, he would be in a better position to overturn his latest capital murder conviction. (R. 1188-89)

C. Arthur's § 1983 (DNA) Action

On April 12, 2007, Arthur filed a § 1983 action seeking access to physical evidence collected in connection with his crime. See (Doc. # 1) In his complaint, Arthur sought an injunction requiring the defendants to grant him access to the following: 1) Judy Wicker's clothing; 2) Judy Wicker's rape kit; 3) a wig and hair samples collected from Judy Wicker's car; 4) vacuum sweepings from the Wickers' den; 5) hair samples from a shoe; 6) spent cartridges, a bullet, and a pillow case; and 7) photographs of the crime scene that were admitted into evidence at trial. Id. at 10-13. Arthur filed his complaint 25 years after his crime, 15 years after his third conviction and sentence of death, nine years after the conclusion of his direct review, five years after the conclusion of his State post-conviction proceeding, six years after he filed his petition for federal habeas relief, and four days before this Court denied his petition for certiorari review of his habeas proceedings. See (Doc. # 14 at 5-7); Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3-4 (M.D. Ala. Aug, 17, 2007) (a detailed chronology of the proceedings). Furthermore, after filing his § 1983 action, Arthur made no effort to expedite the proceedings. See (Doc. #14 at 10); Arthur, 2007 WL 2381992, at *5 ("Although Arthur has not requested a stay of execution, he also has not requested expedited action on his complaint.").

Because Arthur unjustifiably delayed in filing this lawsuit, the defendants (hereinafter "the defendants or the State") moved to dismiss it on laches and statute-of-limitations grounds.[2] (Doc. #8 at 35-40) On August 17,

---

[2] The district court did not address whether Arthur's complaint was time-barred by the statute of limitations. (Doc. #14)

2007, the district court granted the defendants' motion to dismiss. (Doc. #14) In granting the defendants' motion, the district court ruled that this action could not be fully litigated without a stay of Arthur's September 27, 2007 execution. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3 (M.D. Ala. Aug, 17, 2007). The district court further held that Arthur is not entitled to a stay of execution for the following reasons: 1) he cannot establish a reasonable likelihood of success on the merits; 2) the balance of the equities "clearly favors the State and operates against the entry of a stay of execution; and 3) he unreasonably delayed in filing this action. See (Doc. #14) Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3-13 (M.D. Ala. Aug, 17, 2007).

On August 21, 2007, Arthur filed a notice of appeal. (Doc. #16) Thereafter, on August 27, 2007, ten (10) days after the district court dismissed his action, Arthur filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. # 18) In his motion, Arthur argued the following: 1) a new affidavit from Ray Melson provides evidence of innocence; 2) Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001), is factually distinguishable; and 3) the court should not consider unreasonable delay in its equity analysis.[3]

---

[3] Melson has provided four affidavits throughout Arthur's litigation. The affidavits obtained from Melson in 2002, see Doc. # 18-2 and 18-3, were filed in the district court during habeas proceedings. Arthur filed the initial affidavit from Melson, see Doc. # 18-2, that stated that Melson saw Arthur in Decatur about the same time that the murder was taking in muscle shoals. The State submitted a counter-affidavit from Melson, see Doc. 18-3, that stated that he was unsure on what day he saw Arthur. Arthur filed yet another affidavit from Melson, see Doc. # 18-5, on August 27, 2007 that stated that he saw Arthur on the morning of the murder. The defendants obtained yet another affidavit

On August 30, 2007, the district court denied Arthur's Rule 59(e) motion. (Doc. #19) Thereafter, on September 21, 2007 the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of Arthur's § 1983 lawsuit. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

REASONS FOR DENYING THE WRIT

As an initial matter, it bears emphasis that Arthur is not challenging the validity or constitutionality of his conviction or sentence. Instead, he asks this Court to hold that he has a right to delay the administration of his sentence of death in order to enable him to litigate whether or not he has a constitutional right to post-conviction access to evidence. In other words, Arthur seeks a ruling from this Court that, under the Constitution of the United States and federal law, he has a right to delay his September 27, 2007 execution to afford him sufficient time to investigate the facts of his 1982 crime. This Court should decline to grant certiorari review.

I. This Court Should Decline To Review The Issues Presented By Arthur Because His Petition Is (At Most) A Request For Fact-Bound Error-Correction.

The district court dismissed Arthur's action based on the following fact-bound determinations: (1) Arthur unreasonably delayed in filing his § 1983 action; (2) due to that delay the merits could not be litigated without the

---

from Melson stating the he does not know when he saw Arthur. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

entry of a stay of execution; and 3) he is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007). Applying binding precedent from this Court to the district court's factual determinations, the Eleventh Circuit affirmed the dismissal of Arthur's action. Arthur, 2007 WL 2744884 (applying the equitable principles that were reiterated in Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006) and Nelson v. Campbell, 541 U.S. 637, 650, 124 S.Ct. 2117, 2126 (2004)).

Because the district court's dismissal of this action and the Eleventh Circuit's affirmance rests soundly an application of this Court's precedent to the district court's factual determinations, Arthur can only seek fact-bound error review. See Pet. at 22 (The Eleventh Circuit . . . made erroneous factual determinations. . . ."); Pet. at 23-28 (Arthur merely contests the factual determination that favorable results of the testing he seeks cannot establish his innocence.). As this Court is well aware, however, a request for what can only be understood as pure fact-bound, error-correction is, as a general rule, an insufficient basis for certiorari. See Sup. Ct. R. 10; R. Stern, E. Gressman, et al., Supreme Court Practice § 4.14, at 249 (8th ed. 2002). Therefore, this Court should deny Arthur's petition for writ of certiorari.

II. This Court Should Decline To Review The Issues Presented By Arthur Because He Has Not Established A Traditional Rule 10 Ground For This Court To Exercise Its Discretionary Review.

This Court should decline to review the issues presented by Arthur because he has not (and cannot) established any of the tradition Rule 10 grounds for granting certiorari – a conflict with other circuits or state

courts of last resort or an important question of federal law. Sup. Ct. R. 10.

In Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006), this Court recognized numerous equitable principles that courts should consider when a death row inmate files a § 1983 action in the face of an imminent execution. 126 S. Ct. at 2104. The Eleventh Circuit correctly stated:

> Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiff's satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (2004). The strong interest of the State and the victims' families is in "the timely enforcement of a sentence", id. at , 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998).

Arthur, 2007 WL 2744884 (emphasis added). In affirming the district court's determination that Arthur is not entitled to a stay of execution, the Eleventh Circuit applied the equitable principles detailed by this Court in Hill. Id.

Arthur hopes to catch this Court's eye by alleging a circuit split; however, the split he identifies is illusory. Pet. at 14-19. Arthur makes two arguments to support his contention that a circuit split exists. First, Arthur alleges that the Fifth, Eighth, and Eleventh Circuits use an unreasonable delay requirement while the Ninth Circuit employs a fact-specific inquiry. Id. Second, Arthur contends that the Sixth Circuit ignores equitable standards and has adopted a statute-of-limitations rule. Id. The State addresses each of these items in turn.

A. Arthur's Contention That The Ninth Circuit Conflicts With The Eleventh Circuit Is Misleading And Erroneous.

In his petition, Arthur contends that in determining whether to apply the strong equitable presumption against granting a stay the Eleventh Circuit makes no inquiry into the specific facts of a petitioner's delay while the Ninth Circuit "requires a fact-specific inquiry." Pet. at 19. In order to make this argument, Arthur has misrepresented the proceedings below as well as numerous holdings from the Eleventh Circuit (including the holding in this case). As will be shown, like the Ninth Circuit, the Eleventh Circuit requires a fact-specific consideration of the equitable principles detailed by this Court.

In Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005), the very case mentioned in Arthur's petition, the Ninth Circuit applied a "timeliness" inquiry to deny a stay of execution. Id. at 1069-70. In fact, the Court stated: "To be sure, as the Supreme Court has instructed in Nelson and Gomez, the district court is entitled to take delay into consideration in exercising its equitable powers." Id. at 1069. The Beardslee Court then ruled that the district court erred by applying a "general rule that a claim was dilatory if first filed at the time when the

possibility of execution became imminent." Id. at 1070. Instead, courts should conduct "a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." Id.[4]

Like the Ninth Circuit, the Eleventh Circuit has repeatedly held that "the equitable considerations in each case are naturally different. . . ." Arthur, 2007 WL 2744884; Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir. 2007) ("the equitable considerations in each case are naturally different."). In this case, both the district court and the Eleventh Circuit analyzed Arthur's delay by considering Arthur's actions and the specific facts of Arthur's case. Arthur, 2007 WL 2744884; Arthur, 2007 WL 2381992 at *1-4, 13 (detailing the Arthur's actions and his delay). In fact, in addressing Arthur's delay, the Eleventh Circuit specifically noted that in 2004 it informed Arthur's attorney that she could file a § 1983 action seeking DNA testing. Arthur, 2007 WL 2744884, at *n.5.

Despite Arthur's argument to the contrary, the Eleventh Circuit, like the Ninth, does apply a fact-specific timeliness inquiry. Thus, there is no circuit split with the Ninth Circuit, and this Court should deny certiorari and deny the stay application.

B. This Court Should Not Grant Certiorari Because The Sixth Circuit Has Time-Barred a Lethal-Injection Challenge Based On The Statute of Limitations.

---

[4] The Beardslee Court, despite stating that a "fact-specific inquiry to ascertain whether the claims could have been brought earlier [] and whether the petitioner had good cause for the delay," see Beardslee at 1070, engaged in no such inquiry.

The district court in this case did not address the State's motion to dismiss Arthur's complaint on statute-of-limitations grounds. The State did not raise the statute-of-limitations issue in its Eleventh Circuit brief. It is unclear why Arthur believes that certiorari should be granted on an issue that was not addressed by the district court and not raised in the Eleventh Circuit.

Recently, the Sixth Circuit, in Cooey v. Strickland, determined that a death row inmate's § 1983 method-of-execution challenge accrues for statute-of-limitation purposes at the conclusion of direct review – when the sentence becomes final – or when the State elects lethal injection as its method of execution. Cooey v. Strickland, 479 F.3d 412, 422 (6th Cir. March 2, 2007), rehearing denied, Cooey v. Strickland, __ F.3d __, 2007 WL 1574663 (6th Cir. June 1, 2007).[5] The Cooey case appears to be the only reported decision of a federal appeals court addressing the issue of when a death-row inmate's § 1983 method-of-execution challenge accrues for statue of limitation purposes. In a recent case, the Sixth Circuit applied the "timeliness" inquiry articulated in Nelson and Hill in denying a stay of execution. Workman v. Bredesen, 486 F.3d 896, 911 (6th Cir. 2007). The Court further stated that the claim was time-barred under either the majority or dissent's analysis in Cooey. Id. Thus, the Sixth Circuit did not have to apply the equitable standard used here.

As previously stated, the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit. Thus, the statute of limitations

---

[5] A petition for certiorari filed by the plaintiff inmate in Cooey is pending. Cooey v. Strickland, 07-6234.

issue is not presented in this case and is not a reason for this Court to grant certiorari.

As stated above, this Court has held that courts must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50 (2004)). The courts below applied this Court's precedent, which is binding on all circuit courts; therefore, Arthur cannot establish a circuit split.

Further, because this Court has detailed the equitable principles courts must consider when deciding whether equitable relief is available, Arthur cannot show that decision below rests on an important question of unsettled federal law. Consequently, Arthur cannot establish a traditional Rule 10 ground for this Court to exercise its discretionary review, and the petition should be denied.

III. The Court Should Deny Arthur's Petition For Certiorari And His Motion For A Stay Of Execution Because The Eleventh Circuit's Decision Was Correct.

As stated above, the district court dismissed Arthur's § 1983 action seeking access to evidence for the following reasons: (1) Arthur unreasonably delayed in filing his § 1983 action; (2) due to that delay, the merits could not be litigated without the entry of a stay of execution; and 3) he is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007). Arthur and Arthur alone chose when to file this action. He could have filed it years ago, when there was plenty of time to fully litigate the merits, yet, he chose to wait until he knew that an execution date would be set.

Against this backdrop, the Eleventh Circuit faithfully applied the equitable considerations detailed by this Court in Hill and Nelson and affirmed the district court's dismissal.

A. The Eleventh Circuit Correctly Determined That Arthur Unreasonably Delayed In Filing This Action.

This Court reiterated in Hill what it said in Nelson, 541 U.S. at 649-50, about a stay of execution being an equitable remedy, not available as a matter of right, and that federal courts considering a stay request must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006). "The federal courts can and should protect States from dilatory or speculative suits. . . ." Hill, 126 S. Ct. at 2104. To accomplish this objective, "[a] court considering a stay must . . . apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Id. (quoting Nelson v. Campbell, 541 U.S. 637, 649-50 (2004)); See also Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654, (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

Arthur unreasonably delayed in filing this action and due to his decision to wait until the 11th hour to file this action, the courts below could not reach the merits without entering a stay of execution.[6] As the district court

---

[6] On pages 29 and 30 of his petition, Arthur attempts to excuse his delay by arguing he waited to file his § 1983 action until his habeas

correctly found "Arthur's request cannot be litigated without entry of a stay of execution." Arthur, 2007 WL 2381992, at *4. "Nine weeks after this action was filed, the Alabama Supreme Court set Arthur's execution date for September 2[7], 2007." Id. at *5. With five months to litigate the merits of this action and knowing that it took over four years for Darrell Grayson to litigate an identical claim, Grayson v. Allen, 491 F.3d 1318, 1319 (11th Cir. 2007), Arthur made no effort to expedite the proceedings. Id. at *3-5. Once in the Eleventh Circuit, Arthur (finally spurred into action) sought expedited briefing and a stay of execution. See Arthur, 2007 WL 2744884. Arthur's actions were too little too late. As Grayson v. King, demonstrates, the merits of Arthur's complaint (not to mention appeals) would take much longer than five months, a reality that a last-minute request for expedited proceedings cannot cure.

The courts' inability to reach the merits without a stay of execution is due solely to Arthur's unreasonable delay in filing the action. "Arthur was first convicted of Troy[] [Wicker's] murder in February 1982." Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *13 (M.D. Ala. Aug, 17, 2007). "With two successful appeals and resulting new trials in state court, Arthur was convicted a second time on May 13, 1987, and a third time on December 5, 1991." Id. at *10. Six years prior to filing his current

---

proceedings neared conclusion to conserve judicial resources. According to Arthur, it would have been unreasonable for him to "ignore[] the important interest in conserving scarce judicial resources" by pursuing his § 1983 action while his habeas action was pending. Pet. at 29-30 Arthur's alleged noble intentions are belied by the fact that he filed two separate § 1983 actions in two separate federal district courts when these two actions could have been filed together in the Middle District of Alabama.

action, Arthur filed his habeas petition and sought a stay of execution. Id. (citing Arthur v. Haley, 248 F.3d 1302, 1303 (11th Cir. 2001) (motion to vacate stay denied). During his habeas proceedings, Arthur sought and was denied discovery of the same evidence he seeks in this action. Arthur, 2007 WL 2744884.

He waited fifteen years after his third conviction and sentence of death, and six years after he filed his federal habeas petition to file his action seeking access to evidence. Arthur, 2007 WL 2381992, at *10. He has known since the habeas court denied his motion for discovery in 2002 that the State would not voluntarily grant him access to the evidence. In fact, Arthur wrote the defendants seeking access to the evidence in 2003 and was "[o]bviously, . . . unsuccessful in his requests." Id. Armed with the knowledge that the State would not grant him access to the evidence he sought, Arthur waited five years to bring this lawsuit.

Moreover, during those five years, Arthur became well aware that he could seek access to evidence by filing a § 1983 lawsuit. On September 23, 2002, four and a half years before Arthur filed his current action, the Eleventh Circuit determined that a prisoner may seek access to evidence by filing a § 1983 action. See Bradley v. Pryor, 305 F.3d 1287, 1289-91 (11th Cir. 2002). Additionally, during oral argument regarding Arthur's federal habeas action, the Eleventh Circuit specifically informed Arthur's current attorney Suhana Han that Arthur could seek access to physical evidence in a § 1983 action. Arthur, 2007 WL 2744884, at *n. 5 ("[D]uring oral argument on Arthur's federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim."). These facts establish that Arthur was aware that he could seek access to evidence by filing a § 1983, yet, chose to wait to file this action until

the merits could not be reached without the entry of a stay of execution.

Even after Arthur filed this § 1983 action and the Supreme Court of Alabama set an execution date, he continued to delay. As the district court noted, Arthur never "requested expedited action on his complaint." Arthur, 2007 WL 2381992, at *5; see also Arthur, 2007 WL 2744884 (11th Circuit noted that Arthur did not move the district court to expedite the proceedings). Arthur's delay in prosecuting his action is evidenced by the fact that he did not obtain the third Melson affidavit until after the District Court dismissed his action. As the district court aptly stated, "[t]he court cannot fathom, if this is in fact 'powerful evidence of Mr. Arthur's innocence'" (Mot. at 3.), why the statement did not surface one, two, three, or four years after the 2002 repudiation affidavit, or even as an exhibit filed with the complaint in April 2007." Arthur, 2007 WL 2539962, at *2. The district court went on to "conclude that [Arthur's Rule 59] motion is a desperate last-minute effort in the shadow of an execution date to postpone or avoid that date." Id.

Furthermore, Arthur could have filed this action in such a time as to allow a determination of the merits without the entry of a stay of execution. Between the time that the Eleventh Circuit decided Bradley and the time that Arthur chose to file his § 1983 action, another death row inmate, Darrell Grayson filed an identical lawsuit and fully litigated whether he was entitled to access to evidence. See Grayson v. King, 460 F.3d 1328 (11th Cir. 2006). While Grayson litigated his claim to access to evidence, Arthur waited until a merits determination could not be reached without a stay of execution.

Because Arthur "could have . . . brought [this action] at such a time as to allow consideration of the merits without requiring entry of a stay" but chose not to do so,

the courts below properly applied the "strong equitable presumption" mandated by this Court and correctly determined that Arthur is not entitled to a stay. Id. (quoting Nelson, 541 U.S. at 649-50). Therefore, this Court should deny Arthur's petition for certiorari and his motion for a stay of execution.

B. The Courts Below Correctly Determined That Arthur Is Not Entitled To A Stay Of Execution Because The Balance Of The Equities Weigh Against Him.

The courts below correctly determined that Arthur is not entitled to a stay of execution because the balance of the equities firmly tilts against him. "[T]he equitable considerations in each case are naturally different. . . ." Arthur, 2007 WL 2744884 (quoting Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir. 2007)). No matter what factual distinctions exist, however, "[a] court considering a stay of execution must ... apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006). As detailed above, the district court determined that Arthur unreasonably delayed in filing this action and properly applied the strong equitable presumption mandated by this Court.

Applying the equitable considerations detailed by this Court and balancing the equities, the courts below properly determined that "Arthur fail[ed] to overcome the strong equitable presumption against the grant of a stay." Arthur, 2007 WL 2381992, at *4. First, Arthur's interest in adjudicating his claims is weakened by the fact that he cannot establish a reasonable likelihood of success on the merits. Arthur, 2007 WL 2744884 ("The evidence which he seeks is the same evidence that was considered by the

district court during his habeas corpus petition and which will not clearly exonerate him. He is unable to show a likelihood of success on the merits and the balance of the equities weigh against the grant of a stay."). His interest is further weakened because the evidence he seeks cannot establish his innocence, and thus is of no use to him. Id. (Section III.C. of this brief).

The State, on the other hand, has a well recognized interest in enforcing its duly adjudicated judgment. It is well settled that, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." Hill, 126 S. Ct. at 2104 (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998)); see also Jones, 485 F.3d at 638 (same); Grayson v. King, 460 F.3d 1328, 1342 (11th Cir. 2006) ("[T]he government has a strong interest in the finality of duly adjudicated criminal judgments."). Once the post-trial proceedings have run their course, as here, the "State's interest in meting out a sentence of death in a timely manner acquires 'an added moral dimension.'" Arthur, 2007 WL 2381992, at *12 (quoting Calderon v. Thompson, 523 U.S. 538, 556 (1988). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir.1983). The district court correctly determined that the State and the victims' interests in the timely enforcement of its judgment outweigh Arthur's request for access to evidence that can not establish his innocence.

Because the balance of the equities clearly disfavors a stay of execution, Arthur cannot establish that the courts

below abused their discretion by dismissing this action. Therefore, this Court should deny his petition for writ of certiorari. Likewise, this Court should deny Arthur's request for a stay of execution.

C. The Courts Below Correctly Determined That Arthur Could Not Establish A Likelihood Of Success On The Merits; Therefore, He Was, And Is, Not Entitled To A Stay Of Execution.

In his complaint, Arthur alleged that the denial of access to evidence violates the following: 1) his right to due process; 2) his right to access to courts and equal protection; 3) his right to be free from cruel and unusual punishment; and 4) his right to apply for executive clemency. For numerous reasons, the district court properly determined that Arthur could not establish a likelihood of success on the merits of these claim.

Although there are many reasons the district court correctly found that Arthur could not establish a reasonable likelihood of success on the merits, see Arthur, 2007 WL 2381992, at *5-11, one overriding fact makes this case particularly unworthy of certiorari review: Favorable test results on the evidence Arthur seeks will not exonerate him and cannot undermine confidence in the outcome of the trial. Arthur, 2007 WL 2381992, at *7 ("Arthur cannot establish that DNA testing, even if the testing results in a favorable outcome, will exonerate him of murder."); Arthur, 2007 WL 2744884 (same).

As United States District Judge Edwin Nelson, in his order dismissing Arthur's habeas petition, stated:

> Although Arthur generally claims that a new examination of the evidence might obtain results contrary to Wicker's version of events, his specific allegations do not support his claim. He has a notion that blood typing or DNA testing of Judy

Wicker's bloody clothing might show someone else assaulted her, but there is no basis in the record for his belief that the blood on her clothing belonged to her assailant. Rather, the evidence was that Wicker was assaulted from behind, did not struggle, and was bleeding due to extensive head and face injuries. Arthur contends examination of the rape kit and vacuum sweepings could support Wicker's prior testimony about being assaulted and raped by someone else, but merely showing another person was with Judy Wicker or in her home at some unspecified time does little to support her prior testimony or further impeach her testimony about Arthur's involvement. At best, it would provide some additional inference about Judy Wicker's veracity, a subject which was amply covered during the trial. Arthur also speculates that DNA tests of the wig and hair samples from the car could show Wicker fabricated her testimony that Arthur wore a wig and dark face makeup to disguise himself as a 'black man.' However, expert testimony at the trial indicated the hair samples were of African American origin. Arthur provides no support for his speculation that different tests could impeach Wicker's testimony. Experts testified the cartridge casings and bullets were consistent with the type of ammunition Patricia Green obtained for Arthur on the day prior to the murder. Arthur hopes that his tests might now show an inconsistency, but does not explain the reasons for his expectation. Finally, Arthur seeks to resolve a discrepancy he perceives in the evidence. He points to expert testimony indicating gunpowder residue on the pillowcase found beneath Troy Wicker's head show the murder weapon was not discharged at close range.

> This, he argues, conflicts with Wicker's testimony that her husband was shot while sleeping and the autopsy report that Troy Wicker died of a gunshot wound to the right eyelid 'fired at a close range.' He seeks to examine the pillowcase and crime scene photographs to resolve this discrepancy. Judy Wicker did not testify about the distance between the killer and her husband so the discrepancy is not relevant to her testimony. Any discrepancy between the expert witnesses was heard and resolved by the jury and no further investigation is warranted.

(Doc. #8-1); Arthur, 2007 WL 2744884, at *n.4. United States District Judge Scott Coogler, in denying Arthur's motion to alter or amend the judgment, likewise ruled that favorable test results would not establish factual innocence.

> ...Arthur's conjectures about the relevance of the evidence of his claim of actual innocence fall far short of 'specific allegations showing reason to believe' that the fully developed facts might entitle him to relief. Arthur seeks DNA testing of the blood on Judy Wicker's clothing, stating that he wants to show her assailant was someone other than him, but offers no 'reason to believe' that the blood on Judy Wicker's clothing came from anyone other than Judy Wicker. Arthur seeks to examine the 'afro' wig and Negroid hair samples taken from Judy Wicker's car, contending testimony that the hair was forcibly removed and the inside of the wig was free of hair was inconsistent with Wicker's testimony that Arthur wore a black wig to disguise himself. While there has been no explanation for the hair found in the car and the lack of hair in the wig, the findings are not inconsistent with Wicker's

testimony. Further, Arthur offers no 'reason to believe' his examination would reveal anything other than what is already established, and therefore, there is no 'reason to believe' his examination could show he is 'more than likely' innocent.

Arthur seeks access to the bullet recovered from Troy Wicker's body and four spent cartridge casings found at the scene, claiming Patricia Green's testimony that she sent a third party to purchase .22 mini magnum long rifle bullets for Arthur on the day before the murder was insufficiently corroborated by the ballistic expert's testimony that the recovered bullet was a .22 long rifle caliber consistent with a CCI brand mini mag and the four shell casings were CCI brand .22 long or long rifle casings. But, Green's testimony was consistent with the testimony of the ballistic expert and does not require corroboration. Moreover, Arthur does not offer 'reason to believe' that his examination of the bullet and casings will reveal any different information from that already discovered by the experts.

Arthur seeks access to a gunpowder-tainted pillowcase and crime scene photographs arguing he must resolve an inconsistency between the ballistic expert's testimony and the autopsy report regarding the 'critical issue' of whether the gun was fired at close or far range. However, he offers no explanation for his conclusory claim that this discrepancy is 'critical' to his claim of actual innocence. He implies that he might be able to impeach Judy Wicker's testimony that her husband was sleeping when he was shot, but

> Wicker did not testify about the distance from which Troy Wicker was shot.
>
> Arthur seeks to test Judy Wicker's rape kit. He alleged in his initial motion and in his present motion that Judy Wicker previously testified a 'black man' forced his way into her home, beat her, raped her, and killed her husband, but he did not point to any evidence of record that supports his assertion. This Court's review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder. Arthur has not offered any reason to believe that testing the rape kit would help show he was 'more likely than not' actually innocent of Troy Wicker's murder. Similarly, Arthur has not explained how examination of vacuum sweepings of the Wicker home could show he is 'more likely than not' actually innocent.
>
> Finally, none of the physical evidence can help Arthur establish his gateway claim of actual innocence because such a claim must rest on 'new reliable evidence' which was 'not presented at trial.' Schlup v. Delo, 513 U.S. 298, 324 (1995). Although Arthur claims some of the items were not tested, he does not claim or show that the items or proposed tests were unavailable at the time of his trial. Many of the items were admitted at trial. Thus, this evidence is not 'new' as required by Schlup.

(Doc. #8-2); Arthur, 2007 WL 2744884, at *n.4. Based on the evidence presented at trial, granting Arthur access to physical evidence, the testing of which would not have altered the outcome of his trial, would be of little or no

probable value. Id. Thus, the district court correctly determined that the only purpose for which Arthur could use the evidence he seeks is "to discredit the veracity of the testimony of Judy with the speculative results of DNA evidence." Id.

Discrediting Judy Wicker, however, would be of little or no value to Arthur because there was overwhelming evidence corroborating Wicker's testimony and independently establishing his guilt. As the district court below outlined:

> Thirteen witnesses testified for the State, many of whom corroborated Judy's testimony. Various witnesses testified to events outside of Judy's testimony that implicated Arthur in Troy's murder. Of particular interest is the testimony that twenty one hundred dollar bills were found in Arthur's coat pocket after Troy's murder; that Tynes observed Arthur throw a garbage bag into the Tennessee River on the day of the murder in order to "get rid of some old memories;" that Green obtained .22 long rifle bullets for Arthur on the day before the murder; that Arthur told Green that someone would be murdered; that the bullet found in Troy's body and the shell casings found at the scene were from .22 long rifle bullets; and that Reagan could not testify as to the whereabouts of Arthur on the day of Troy's murder.

Arthur, 2007 WL 2381992, at *6. Based on the foregoing, the district court correctly found that "[t]he discrediting of Judy's testimony would not exonerate Arthur of Troy's murder or undermine confidence in the conviction of Arthur in view of the evidence otherwise linking him to the murder." Id. at *7.

With overwhelming evidence corroborating Judy Wicker's testimony and independently establishing Arthur's guilt, certain inescapable conclusions necessarily follow. First, Arthur cannot establish that testing the evidence and discrediting Judy Wicker's veracity would undermine confidence in the outcome of the trial, United States v. Bagley, 473 U.S. 667, 682 (1985); therefore, he cannot establish that he is entitled to such testing under Brady v. Maryland, 373 U.S. 83 (1963). Second, he cannot establish that there is any additional procedural value in granting him access to the evidence or that there is any risk of an erroneous deprivation of his life or liberty through the procedures used (three trials, direct appeal, state post-conviction, and federal post-conviction proceedings). Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Third, Arthur cannot establish that the denial of access to non-exculpatory evidence has violated his right to effectively petition for executive clemency. Finally, testing of the evidence cannot establish a gateway claim of innocence under Schlup v. Delo, 513 U.S. 298, 324 (1995), nor can it establish a hypothetical Eight Amendment innocence claim under Herrera v. Collins, 506 U.S. 390, 414, 113 S. Ct. 853, (1993). Consequently, Arthur cannot establish that the defendants refusal to grant him of access to evidence violates his right to due process, to access to courts, to equal protect, to be free from cruel and unusual punishment, or to apply for clemency. In short, the only true value Arthur could derive from testing the evidence he seeks is the further delay of his execution.

Because favorable results from testing the evidence Arthur seeks could not establish his innocence or undermine confidence in the outcome of the trial, the courts below correctly determined that Arthur could not establish a reasonable likelihood of success on the merits of his access to evidence claim and dismissed this action.

Based on the forgoing, this Court should deny Arthur's petition for writ of certiorari and motion for a stay of execution.

CONCLUSION

For the above-mentioned reasons, this Court should deny the petition for certiorari and the accompanying motion for a stay of execution.

Respectfully submitted,

TROY KING
Attorney General of Alabama

J. CLAYTON CRENSHAW*
Assistant Attorney General
*Counsel of Record**

JASPER B. ROBERTS, JR.
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300, 242-7423*

Counsel for Respondents

69

(2)

FILED
OCT 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-397

IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

TROY KING,
Attorney General for the State of Alabama,
in his official capacity, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

SUHANA S. HAN
Counsel of Record
SARA L. MANAUGH
JORDAN T. RAZZA
SULTANA L. BENNETT
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner
Thomas D. Arthur

October 9, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Circuit Courts Have Adopted Conflicting Tests for Determining Whether § 1983 Actions Brought by Death-Sentenced Inmates May Proceed. 2

A. The Ninth Circuit's Inquiry Differs Qualitatively from That of the Fifth, Eighth and Eleventh Circuits. 2

B. The Sixth and Eleventh Circuits Have Applied Different Analyses Under Analogous Circumstances. 4

C. The Eleventh Circuit Alone Has Applied the "Strong Equitable Presumption" to a § 1983 DNA Access Complaint. 5

II. In Relying on the Decisions of the Habeas Court, the Eleventh Circuit Failed to Recognize the Exculpatory Power of DNA Testing. 6

A. DNA Testing Could Provide Powerful Evidence of Mr. Arthur's Innocence. 7

B. A Denial of Access to DNA Testing Cannot Rest on Demonstrably Flawed Fact-finding. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Arthur v. *King*,
No. 07-13933, 2007 U.S. App. LEXIS
22533 (11th Cir. Sept. 21, 2007) 3–4, 6

Arthur v. *King*,
Case No. 2:07-cv-319-WKW,
2007 U.S. Dist. LEXIS 61058
(M.D. Ala. Aug. 17, 2007)) 6

Beardslee v. *Woodford*,
395 F.3d 1064 (9th Cir. 2005) 3

Cooey v. *Strickland*,
479 F.3d 412 (6th Cir. 2007) 5

Heck v. *Humphrey*,
512 U.S. 477 (1994)..... 1

Herrera v. *Collins*,
506 U.S. 390 (1993)..... 6

Hill v. *McDonough*,
126 S. Ct. 2096 (2006) 5

Nelson v. *Campbell*,
541 U.S. 637 (2004)..... 5

Williams v. *Allen*,
No. 07-13638, 2007 U.S. App. LEXIS
19836 (11th Cir. Aug. 21, 2007) 4

Page(s)

STATUTE

42 U.S.C. § 1983 ..... *passim*

In its Opposition, the State of Alabama has "emphasi[zed]" for the Court's benefit that Mr. Arthur's Petition does not challenge the "validity or constitutionality of his conviction or sentence," and has erroneously asserted that Mr. Arthur "asks this Court to hold that he has a right to delay" his execution. (Opp. at 11–12.) The State thus does not merely mischaracterize Mr. Arthur's Petition; it also attempts to devalue it on the basis that it fails to seek relief that this Court has unambiguously held to be unavailable in cases such as this one. *See Heck* v. *Humphrey*, 512 U.S. 477 (1994). The questions Mr. Arthur asks this Court to resolve are neither improper nor presumptuous. Rather, Mr. Arthur asks that this Court provide much-needed guidance to lower courts and litigants regarding the contours of a death-sentenced inmate's right of access to DNA testing that could demonstrate his innocence.

To the extent that the State has not conceded the existence of a circuit split on the question of the limits on a death-sentenced inmate's right to bring claims under 42 U.S.C. § 1983, it has mischaracterized the relevant decisional law in an attempt to obscure the deep divisions among the Circuits. Further, the State encourages this Court to endorse the flawed reasoning and fact-finding that led the lower courts to conclude erroneously that the results of DNA testing would not bear on Mr. Arthur's culpability.

I. The Circuit Courts Have Adopted Conflicting Tests for Determining Whether § 1983 Actions Brought by Death-Sentenced Inmates May Proceed.

The State's contentions notwithstanding, Mr. Arthur's Petition establishes that there is nothing "illusory" (Opp. at 14) about the conflict among the Circuits regarding the appropriate standard to apply to a death-sentenced inmate's § 1983 complaint. To the contrary, the cases cited in the Petition make salient the divergence among the lower courts' treatment of such complaints.

A. The Ninth Circuit's Inquiry Differs Qualitatively from That of the Fifth, Eighth and Eleventh Circuits.

The State attempts to minimize the critical differences between the inquiry prescribed by the Ninth Circuit and that embraced by the Eleventh Circuit in evaluating death-sentenced inmates' § 1983 actions.[1] Its contention that the Ninth Circuit and the Eleventh Circuit apply the same "fact-specific inquiry" to such cases is belied not only by the analysis performed by the courts but also by the courts' affirmative statements as to what standards apply.

---

[1] The State does not dispute, and thus apparently concedes, that a conflict exists between the Ninth Circuit and the Fifth and Eighth Circuits. Mr. Arthur does not abandon the argument that the Fifth and Eighth Circuits are aligned with the Eleventh Circuit and in conflict with the Ninth and Sixth Circuits on the issue presented in the Petition.

In *Beardslee* v. *Woodford*, 395 F.3d 1064 (9th Cir. 2005), the Ninth Circuit concluded that the district court erred in applying a "strong equitable presumption" against granting a stay of execution "solely on the basis that Beardslee had not filed the case until the California Supreme Court lifted its stay of execution." 395 F.3d at 1069. The Ninth Circuit stated that the district court erred by failing to conduct a "fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070.[2]

The Eleventh Circuit's decision embodies the same error that the Ninth Circuit identified in the district court's decision: contrary to the State's assertion, the Eleventh Circuit did not conduct any fact-intensive inquiry. The inquiry prescribed by the Ninth Circuit entails a careful weighing of equities, facts and competing interests; by contrast, the Eleventh Circuit's standard effectively forecloses any such weighing: the presumption that it imposes is, by its own terms and in practice, irrebuttable. *Arthur* v. *King*, No. 07-13933, 2007 U.S. App. LEXIS 22533, at *15 (11th Cir. Sept. 21, 2007) ("[E]quitable principles . . . *mandate dismissal* when the plaintiff delayed unnecessarily in bringing the claim, knowing full well that the discovery, evidentiary hearing, and

---

[2] That the *Beardslee* court did not itself perform such "fact-specific inquiry," because it found that the complaint was properly dismissed on the merits, 395 F.3d at 1070, does not undercut the court's explicit holding, as the State implies that it does. (Opp. at 16 n.4.)

decision on the merits . . . could not possibly be accomplished within the short period of time between filing and the scheduled execution date.") (citations and internal punctuation omitted) (emphasis added); *see Williams* v. *Allen*, No. 07-13638, 2007 U.S. App. LEXIS 19836, at *9–11 (11th Cir. Aug. 21, 2007) (affirming dismissal solely on basis of finding of inexcusable delay). Indeed, the Eleventh Circuit held that "even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay [would have] operate[d] (Pet. at A55.) This Court should resolve the stark conflict between the Circuits in favor of the Ninth Circuit's standard, informed as it is by principles of justice, fairness, and equity.

B. The Sixth and Eleventh Circuits Have Applied Different Analyses Under Analogous Circumstances.

The State contends that, because the courts below did not address the application of the statute of limitations to Mr. Arthur's case, it is improper for Mr. Arthur to raise as an issue the Sixth Circuit's anomalous use of limitations periods in evaluating death-sentenced inmates' § 1983 complaints. By its very nature, a circuit split means that courts in other jurisdictions have applied a test that is different from that applied in the case at hand. Consequently, it makes no sense to require a petitioner to challenge in the courts below the tests applied in other circuits before presenting such circuit split to the Supreme

Court. The State's frivolous argument should be rejected.

It is beyond dispute that a statute-of-limitations rule is inconsistent with an equitable standard for measuring the timeliness of § 1983 complaints filed by death-sentenced inmates. In *Cooey* v. *Strickland*, the Sixth Circuit adopted a statute-of-limitations rule for determining the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct appeal of his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 421–22 (6th Cir. 2007). The Sixth Circuit applied this rule under the precise circumstances presented in those cases where the "strong equitable presumption" against entry of a stay is applied, and explicitly grounded its approach in the equitable principles enunciated in *Hill* v. *McDonough*, 126 S. Ct. 2096 (2006), and *Nelson* v. *Campbell*, 541 U.S. 637 (2004), the opinions cited by other lower courts as the source of the "strong equitable presumption."

C. The Eleventh Circuit Alone Has Applied the "Strong Equitable Presumption" to a § 1983 DNA Access Complaint.

The State does not address, and thus concedes, the argument that certiorari review is warranted because *no* Circuit had applied the "strong equitable presumption" against the entry of a stay to a § 1983 action seeking post-conviction DNA testing before the Eleventh Circuit affirmed the dismissal of Mr. Arthur's Complaint, and no Circuit has done so since. This Court should grant certiorari to define

the applicability and contours of the "strong equitable presumption," and decide whether and how such a presumption may be extended from the method-of-execution context to the DNA access context. The latter context presents wholly different legal and equitable concerns, most urgent among which is that granting the relief sought could prevent the "constitutionally intolerable event" of an innocent person being executed. *Herrera* v. *Collins*, 506 U.S. 390, 419 (1993) (O'Connor and Kennedy, JJ., concurring).

II. In Relying on the Decisions of the Habeas Court, the Eleventh Circuit Failed to Recognize the Exculpatory Power of DNA Testing.

The State's Opposition quotes at length the factual findings of the habeas court underlying its ruling that favorable results of DNA testing could not help to establish Mr. Arthur's innocence. (Opp. at 27–30.) The courts below relied in part on some of these same findings in concluding that Mr. Arthur could not show a likelihood of success on the merits of his claims. *Arthur* v. *King*, 2007 U.S. App. LEXIS 22533, at *5–6, *17–18; *Arthur* v. *King*, Case No. 2:07-cv-319-WKW, 2007 U.S. Dist. LEXIS 61058, at *30 (M.D. Ala. Aug. 17, 2007).

Even assuming that it were proper to import such conclusions into an action in a different procedural posture and to which different legal standards apply, it is wholly inappropriate for a court adjudicating a motion to dismiss to rely on the findings of another tribunal as a substitute for an

independent determination as to whether results of DNA testing could undermine confidence in the trial outcome. Because the habeas court demonstrably failed to grasp the capacity of existing DNA data to identify as well as exclude suspects, and failed to understand the facts relevant to the pursuit of DNA testing, such reliance by the courts below was unwarranted.

A. DNA Testing Could Provide Powerful Evidence of Mr. Arthur's Innocence.

DNA databanks established on statewide and nationwide bases now give law enforcement officials the power to solve thousands of "cold cases," some of them decades old and with no other leads or suspects until a match in the databank points to the perpetrator. The FBI's Combined DNA Index System ("CODIS") integrates DNA profiles gathered at the state and local levels into a national DNA database containing millions of convicted offender DNA profiles and nearly 200,000 DNA profiles from unsolved cases, each profile consisting of a unique set of DNA identification characteristics.[3]

The existence of this integrated databank means that the exculpatory potential of the testing Mr. Arthur seeks is not merely speculative. For example, Short Tandem Repeat DNA testing of Judy Wicker's rape kit could prove Mr. Arthur's innocence by identifying the true perpetrator—even if merely

---

[3] *See* CODIS, "National DNA Index System," at http://www.fbi.gov/hq/lab/codis/national.htm (last visited Oct. 8, 2007).

excluding Mr. Arthur could not conclusively prove his innocence. The results from Judy Wicker's rape kit could match a DNA profile of a convicted felon from the CODIS database, demonstrating that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fits the description of her husband's murderer that she provided during her own trial. Furthermore, DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, and that this person was not Mr. Arthur. Not only can such testing exclude Mr. Arthur, redundant DNA test results—establishing the same genetic profile on multiple pieces of evidence—are critical to establishing the identity of the perpetrator of the crime. Thus, DNA testing could provide powerful evidence of Mr. Arthur's innocence by demonstrating that the same person, *i.e.* the real perpetrator, is the source of DNA on multiple pieces of evidence. The circumstantial evidence against Mr. Arthur cannot withstand such DNA test results.

B. A Denial of Access to DNA Testing Cannot Rest on Demonstrably Flawed Fact-finding.

Even aside from the exculpatory potential of DNA test results that went unrecognized in the courts below, the circumstantial evidence presented at Mr. Arthur's trial was weak and unreliable. The courts below not only gave undue credence to this evidence, but compounded the error by relying on the

habeas court's misstatements of the record, omissions, and errors.

For example, the State's Opposition quotes the habeas court's conclusion that "there is no basis in the record for [Mr. Arthur's] belief that the blood on [Judy Wicker's] clothing belonged to her assailant," because "the evidence was that [Judy] Wicker was assaulted from behind [and] did not struggle." (Opp. at 27.) The testimony at Mr. Arthur's third trial, however, does not support the conclusion that Judy Wicker was assaulted from behind. In fact, Judy Wicker testified that she saw the weapon used to hit her—"something nickel plated." (T.R. 773)[4] Moreover, the fact that Judy Wicker's clothing was torn and stained with blood suggests that there was a struggle. Therefore, there is no basis to exclude the possibility that the blood on Judy Wicker's blouse belonged to her assailant.

Further, the State's Opposition quotes the habeas court's statement that "[its] review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder." (Opp. at 29.) As the State is no doubt aware from earlier filings in Mr. Arthur's case, however, witness testimony at Judy Wicker's trial, and a forensic memo produced during the investigation of the crime, contradict this statement. A police officer who was among the first

---

[4] "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third trial.

to arrive at the scene following the murder testified that Judy Wicker told him, "I've been raped"[5]; and a file memo of the Department of Forensic Sciences, Huntsville Division, regarding the rape kit collected from Judy Wicker on the day of the murder indicated that a "small number of spermatozoa" were identified in the vaginal swabs and slides collected. (Exs. 2 and 3 to Complaint.)

In addition, the State's Opposition quotes the habeas court's statements that "[Patricia] Green obtained .22 long rifle bullets for Arthur on the day before the murder" and that "the shell casings found at the scene were from .22 long rifle bullets." (Opp. at 30.) Nowhere, however, does the State acknowledge the unreliability of the testimony of Green, a convicted felon (*see* Pet. at 6); nor does the State note that criminologist Brent Wheeler testified at Mr. Arthur's trial that the spent shell casings were *either* .22 long *or* .22 long rifle, and that no expert matched this recovered bullet to any of the casings. (T.R. 406–07)

Most notably, the habeas court stated, and the State repeated in its Opposition, that Judy Wicker's veracity "was amply covered during the trial." (Opp. at 28.) The DNA testing that Mr. Arthur seeks to conduct, however, was not even available during Mr. Arthur's third trial. No matter how thoroughly Judy Wicker's credibility was tested in 1991, the truth of her testimony can be thrown into question or even disproved by the results of DNA testing. Indeed,

---

[5] Testimony of Lanny Coan, transcript of Wicker trial, at 112.

DNA testing results have exonerated hundreds of people who were found guilty beyond a reasonable doubt—presumably based on evidence at least as credible as that provided by Judy Wicker.

It is beyond dispute that the State of Alabama has no valid interest in violating Mr. Arthur's constitutional rights. This Court should ensure that the perpetuation of error does not lead to such a result.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

Suhana S. Han
Counsel of Record
Sara L. Manaugh
Jordan T. Razza
Sultana L. Bennett
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner
Thomas D. Arthur

October 9, 2007